Supreme Court, U. S.
FILED
JUL 17 1976
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

76-64

October Term, 1976

No.

ALCO-GRAVURE, INC.,

Appellant Below and Petitioner,

vs.

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY AND ELMER J. JUBB,

Appellees Below and Respondents,

and

INTERSTATE COMMERCE COMMISSION,

Appellant Below and Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN J. WALSH
EARL H. NEMSER
Attorneys for Petitioner
One Wall Street
New York, New York 10005
(212) 785-1000

CADWALADER, WICKERSHAM & TAFT
Of Counsel

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	7
I. The Court of Appeals has decided two important federal questions which have not been, but should be, settled by this Court.	7
II. The decision below is in direct conflict with the decision of another Court of Appeals and principles established by other Courts of Appeals on the issue of administrative *res judicata.*	11
III. The decision below has decided two federal questions in conflict with prior decisions of this Court.	12
Conclusion	14

TABLE OF CITATIONS

Cases Cited:

Ahrens v. Commercial Nat. Bank, 100 Okla. 250, 229 P. 237 (1924)	9

Contents

Page

Asbury v. Chesapeake & O. Ry., 314 F. Supp. 310 (D.D.C. 1970) 8

Baltimore & O. R.R. v. Brady, 288 U.S. 448 (1933) 9

Chicago, R.I. & P. Ry. v. Schendel, 270 U.S. 611 (1926) 9, 10

Dennison v. Payne, 293 F. 333 (2d Cir. 1923) 12

Frederichsen v. Renard, 247 U.S. 207 (1918) 8

I.C.C. v. Baltimore & A.R.R., 64 F.R.D. 337 (D. Md. 1974) 5

Johnson v. Chicago, M., St. P., & Pac. R.R., 400 F.2d 968 (9th Cir. 1968) 13

Landreth v. Wabash Ry., 153 F.2d 98 (7th Cir. 1946) 12

Nader v. Allegheny Airlines, Inc., 44 U.S.L.W. 4803 (U.S. June 7, 1976) 13

Pillsbury v. Alaska Packers Ass'n, 85 F.2d 758 (9th Cir. 1936) 12

Sears, Roebuck & Co. v. Blade, 123 F. Supp. 131 (S.D. Cal. 1954) 6

Seatrain Lines, Inc. v. Pennsylvania Ry., 207 F.2d 255 (3d Cir. 1953) 11

Standard Oil Co. v. United States, 283 U.S. 235 (1931) 9

Stoll v. Gottlieb, 305 U.S. 165 (1938) 10, 11

Contents

Page

Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) 10, 11

Terminal Warehouse v. Pennsylvania Ry., 297 U.S. 500 (1936) 13

Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) 10

Wm. W. Bierce, Ltd. v. Hutchins, 205 U.S. 340 (1907) 6, 9

Statutes and Rules Cited:

Interstate Commerce Act, 49 U.S.C. §§ 1 *et seq.* (1970) 2, 3, 4, 5, 6, 7, 8, 9, 12, 13

ICC General Rules of Practice appended to 49 U.S.C.:

Rule 101(a)(2) 5

Rule 101(a)(3) 5

Judiciary and Judicial Procedure, 28 U.S.C. §§1254(1) (1966), 1336(a) (1975) 5

Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, 90 Stat. 31 (Feb. 5, 1976) 4, 7, 9

Contents

Page

Other Authorities Cited:

2 Davis, Administrative Law Treatise, §18.07 at 594 (1970) 11

Groner and Sternstein, Res Judicata in Federal Administration Law, 39 Iowa L. Rev. 300 (1954) 11

Note, Jurisdiction and Collateral Attack: October Term, 1939, 40 Colum. L. Rev. 1006 (1940) 10

APPENDIX

Appendix A—Opinion of United States Court of Appeals 1a

Appendix B—Opinion and Orders of the United States District Court 4a

Appendix C—Interstate Commerce Act, Sections 1(4), 8 and 22, 49 U.S.C. §§1(4), 8, 9, and 22(1) 34a

Appendix D—Findings and Order of Administrative Law Judge 39a

Appendix E—Opinion and Order of Review Board 42a

Appendix F—Order of Appellate Division 49a

In The

Supreme Court of the United States

October Term, 1976

No.

ALCO-GRAVURE, INC.,

Appellant Below and Petitioner,

vs.

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY AND ELMER J. JUBB,

Appellees Below and Respondents,

and

INTERSTATE COMMERCE COMMISSION,

Appellant Below and Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Alco-Gravure, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on April 19, 1976 affirming a dismissal of petitioner's claim for damages.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit affirmed *per curiam* the District Court. This opinion is annexed as Appendix A. The opinion of the United States District Court for the District of Maryland dismissing petitioner's claim for damages is reported at 398 F. Supp. 454 (1975). This opinion is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals dismissing petitioner's damage claim was entered on April 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1966).

QUESTIONS PRESENTED

(1) If a shipper's complaint against a rail carrier for damages before the Interstate Commerce Commission is by final order of the Commission dismissed for lack of subject matter jurisdiction, may the shipper bring suit for damages in the District Court, or is that suit barred by the election of remedies provision of Section 9 of the Interstate Commerce Act, 49 U.S.C. §9 (Supp. 1976)?

(2) Is an administrative agency's final order in a contested adjudicatory proceeding which determined that the agency lacked subject matter jurisdiction *res judicata* in a subsequent civil suit in the District Court seeking the same relief, or is the agency's final order of no binding effect because no party to such proceeding sought direct judicial review?

(3) Can the election of remedies provision of Section 9 of the Interstate Commerce Act, 49 U.S.C. §9 (Supp. 1976), bar a common law action for damages or is such common law action saved by Section 22(1) of the Act, 49 U.S.C. §22(1) (Supp. 1976), which provides that the Act shall not abridge or alter common law remedies?

(4) May one who was not a party in an Interstate Commerce Commission proceeding invoke that proceeding and the election of remedies provision of Section 9 of the Interstate Commerce Act, 49 U.S.C. §9 (Supp. 1976), to bar a subsequent suit against him in the District Court?

STATUTES INVOLVED

The statutes involved are Sections 1(4), 8, 9 and 22(1) of the Interstate Commerce Act, 49 U.S.C. §§1(4), 8 (1959), 9 and 22(1) (Supp. 1976). These statutory provisions are annexed as Appendix C.

STATEMENT OF THE CASE

Petitioner Alco-Gravure, Inc. ("Alco") seeks review of the decision of the Court of Appeals which affirmed the District Court's dismissal of its damage claim against respondents The Baltimore and Annapolis Railroad Company ("B&A") and its President, Elmer J. Jubb ("Jubb").

B&A is a common carrier by railroad subject to the provisions of Part I of the Interstate Commerce Act ("Act"), 49 U.S.C. §§1(1) *et seq.* Alco utilized the rail freight service of B&A as a shipper to and from its Glen Burnie, Maryland printing plant until June, 1972, when B&A embargoed all traffic on its line because of damage to its rail facilities caused by Hurricane Agnes. Thereafter B&A refused to restore service to Alco.

On September 26, 1972, Alco commenced a formal complaint proceeding before the Interstate Commerce Commission against *only* respondent B&A seeking an order requiring B&A to restore rail service to Alco and to pay to Alco the damages it incurred in consequence of B&A's unlawful

cessation of rail service. This complaint was based upon, *inter alia,* B&A's violation of Section 1(4) of the Act.[1]

On April 24, 1974 a Commission Administrative Law Judge rendered an Initial Decision on Alco's formal complaint wherein he found, *inter alia,* that B&A unlawfully abandoned rail operations in violation of Sections 1(4) and 1(18) of the Act. Pursuant to Section 1(4) of the Act, he ordered that B&A's embargo be cancelled, that rail service be restored to Alco, but found that the Commission lacked subject matter jurisdiction to award the damages Alco sought. Having found that the Commission was without jurisdiction to enforce Section 1(18) of the Act, he referred the matter to the Commission's Bureau of Enforcement to bring suit in the District Court under Section 1(20) of the Act to seek to enjoin B&A's unlawful abandonment of rail operations. The Administrative Law Judge's findings and order are annexed as Appendix D.

On July 25, 1974, the Commission brought suit in the District Court against B&A and Jubb pursuant to Section 1(20) of the Act seeking a preliminary and permanent injunction restraining the unlawful abandonment of B&A rail operations. On July 31, 1974 Alco moved to intervene as a plaintiff in this action and filed a proposed complaint seeking *only* injunctive relief pursuant to Section 1(20) of the Act.

---

1. On January 11, 1973 B&A filed an application before the Commission pursuant to Section 1(18) of the Act, 49 U.S.C. §1(18) (1959), for a certificate of public convenience and necessity permitting abandonment of rail operations. On May 26, 1976 the Commission denied B&A's application insofar as it sought to abandon operations which served Alco. Commission Docket No. AB-71. B&A has not sought review of this decision. Section 1(18) of the Act has been amended by Title VIII, Section 801(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, 90 Stat. 31 (Feb. 5, 1976). The relevant language concerning abandonment of rail operations was amended by Section 802 of such act and now appears in 49 U.S.C. §1(a)(1) (1976). The companion enforcement section which was Section 1(20) of the Act, 49 U.S.C. §1(20) (1959), has been repealed by Section 801(b) of such act and the relevant enforcement language was amended by Section 802 of such act and now appears in 49 U.S.C. §1(a)(9) (1976). These new provisions have no effect upon the questions presented in this petition.

On August 22, 1974, almost two years after Alco filed before the Commission its formal complaint seeking damages, the Commission's Review Board adopted the position urged by B&A and dismissed Alco's complaint for lack of subject matter jurisdiction. This opinion and order is annexed as Appendix E. This was not a final Commission order. Rule 101(a)(2) ICC General Rules of Practice appended to 49 U.S.C.

On August 26, 1974 the District Court denied the Commission's motion for a preliminary injunction and granted Alco's motion to intervene. *I.C.C. v. Baltimore & A.R.R.,* 64 F.R.D. 337 (D. Md. 1974). The District Court indicated that it was "not likely to reach this case on the merits until early 1975." *Id.* at 345.

On August 30, 1974, while it could still amend its complaint in the District Court as of right and within the applicable statute of limitations, and having to that point been denied any damage relief by the Commission on jurisdictional grounds, Alco amended its complaint to include a claim against B&A and Jubb, as an aider and abettor, for damages based upon, *inter alia,* violations of Section 1(4) of the Act and common law duties.

On January 16, 1975, the Commission's Appellate Division denied Alco's petition for reconsideration of the Review Board decision. This order is annexed as Appendix F. This was a final Commission order. Rule 101(a)(3) ICC General Rules of Practice appended to 49 U.S.C. The Commission's final order was never subjected to direct review by the District Court, pursuant to 28 U.S.C. §1336(a) (1975).

Prior to the hearing by the District Court of the Commission's and Alco's claims for injunctive relief, in March, 1975, B&A and Jubb moved to dismiss Alco's damage claim, arguing that Alco had elected to pursue a damage remedy before the Commission and was barred from such claim in court.

On April 29, 1975 the District Court rendered its opinion after trial and enjoined the unlawful abandonment of B&A operations; the court also granted B&A's motion and dismissed Alco's damage claim which at that stage in the proceeding was in excess of $260,000 (24a).[2] The court held that the damage claim was barred by Alco's prior formal complaint before the Commission and the election of remedies provision of Section 9 of the Act (31a).

The opinion of the District Court appears to recognize that if the Commission was correct in determining that it was without subject matter jurisdiction to adjudicate Alco's damage claim, then there could not have been an election of remedies under Section 9 of the Act because, in accord with long established principle, the prior pursuit of a non-existent remedy cannot constitute an election (29a). *Wm. W. Bierce, Ltd. v. Hutchins,* 205 U.S. 340, 346-347 (1907); *Sears, Roebuck & Co. v. Blade,* 123 F. Supp. 131 (S.D. Cal. 1954).

However, the District Court independently examined the Commission's jurisdiction over Alco's claim. It determined that the extent of the Commission's subject matter jurisdiction was "unsettled" as a general proposition of law. Under its "contrary reading of the law," the court believed that the Commission erred in dismissing Alco's claims and adopted a position contrary to that previously urged by B&A before the Commission. Accordingly, the court refused to apply *res judicata* to the Commission's final order, but appeared to indicate that it would have done so had Alco unsuccessfully appealed the Commission's final order to the "fullest extent." (29a).

2. Alco measured its damages by the excess costs incurred as a consequence of loss of B&A rail service. Alco's damages continue to accrue since rail service has not yet been resumed.

On April 19, 1976 the Court of Appeals affirmed the District Court's order dismissing Alco's damage claim for the reasons set forth in the opinion of the District Court (3a).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals has decided two important federal questions which have not been, but should be, settled by this Court.

(1) If a shipper's damage remedy is denied by the Commission for lack of jurisdiction and the election provision of Section 9 then bars a similar remedy in the courts, a shipper damaged by a carrier which refuses, under the guise of an embargo, to supply transportation service required by Section 1(4) of the Act is destined to be caught in the toils of a procedural dilemma.[3] A resolution of the first question presented will provide the certainty necessary for the proper administration of the Act's remedial scheme.[4]

Section 9 of the Act gives a shipper damaged by a carrier a choice: a remedy in the Commission or the District Court. Although this Court cautions that remedial statutes are to be liberally construed, the decision below applied the election provision of Section 9 in a manner which effectively denied either remedy.

3. The problem has not been mooted by the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94-210, 90 Stat. 31 (Feb. 5, 1976), because such Act did not effect Sections 1(4), 8 or 9 of the Act.

4. The election of remedies issue would not appear to be peculiar to Commission proceedings. The common law doctrine of election of remedies, under the holding below, would effectively bar the use of protective court actions in the event there is a question as to the extent of an agency's jurisdiction.

A shipper which seeks to enforce a carrier's duty to provide transportation services under Section 1(4) of the Act by initially seeking relief in the courts pursues a route closed by *Asbury v. Chesapeake & O. Ry.*, 314 F. Supp. 310 (D.D.C. 1970), which teaches that a shipper damaged by an embargo has no damage remedy in the District Court unless the embargo is first cancelled by the Commission. It also holds that a shipper which first elects such a remedy in court is barred by Section 9 from thereafter challenging an embargo before the Commission.

Notwithstanding the holding in *Asbury*, and the procedural route to the Commission it specifies in damage embargo cases, shippers will now find that they cannot first seek a remedy in the Commission, for such an attempt will bar a remedy in the courts. Alco sought to challenge the embargo before the Commission (as Asbury taught) but that agency held that it lacked jurisdiction to cancel the embargo, order restoration of service, or award damages. Yet the courts below held that under Section 9, Alco's election to seek a remedy in the Commission barred it from seeking damages in the District Court.

Indeed, the state of the law which brought about this result in Alco's proceeding had led the Administrative Law Judge who rendered the initial decision on Alco's formal complaint therein to comment:

> "The little deferential game of '*Apres vous Jacque; Non, apres vous Gascon*' being played by the ICC and the Courts can result in real harm to specific shippers, such as complainant, and frustrate implementation of transport regulation in general." Commission Docket No. 35735.

The Court has cautioned that "the doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended . . . ." *Friederichsen v. Renard*, 274 U.S. 207, 213 (1918). The decision below represents such an

extension, for at common law the institution of an action dismissed before the merits are reached is not an election, whether the dismissal was right or wrong as a matter of law. *E.g., Ahrens v. Commercial Nat. Bank*, 100 Okla. 250, 229 P. 237 (1924). *See also, Wm. W. Bierce, Ltd. v. Hutchins, supra.*

Heretofore this Court has sanctioned applications of Section 9 to bar suits only when the parties have "proceeded to a determination before the Commission" on the merits. *Standard Oil Co. v. United States*, 283 U.S. 235, 241 (1931). *Accord, Baltimore & O. R.R. v. Brady*, 288 U.S. 448 (1933).

(2) While the courts and Congress seek to improve the capacity of the administrative process to resolve disputes, *e.g.*, Title III, Sections 301 *et seq.* of the Railroad Revitalization and Regulatory Reform Act of 1976, *supra*, amending and adding to, *inter alia*, the interstate Commerce Act, the Court of Appeals has sanctioned an order of the District Court which impairs the effectiveness of final administrative orders. As a consequence, the precedent established leaves in doubt the course to be pursued by litigants after they adjudicate claims through the final stage of the administrative process.

If the election provision of Section 9 is not applicable to a proceeding dismissed for lack of subject matter jurisdiction, the decision below can be justified only if a final agency order determining a question of subject matter jurisdiction is *not res judicata* in a collateral proceeding. This Court has never determined this issue.

In 1926, the Court in *Chicago, R.I. & P. Ry. v. Schendel*, 270 U.S. 611 (1926), indicated that it was not called upon to determine this question since the administrative proceeding was in progress when *res judicata* was pleaded as a bar. The Court said that before *res judicata* is applicable there must be a "final judgment." *Id.* at 623. But is more necessary? According to the decision below an administrative order must be appealed to the courts to the "fullest extent" before it is *res judicata.*

Since *Schendel* this Court has developed the question to a point where *res judicata* applies to a judicial proceeding which was never subjected to appeal and which determined a question of subject matter jurisdiction, whether that determination was right or wrong. The time is now ripe for this Court to decide whether this rule should embrace administrative adjudicatory proceedings.

In *Stoll v. Gottlieb,* 305 U.S. 165 (1938), the Court departed from what has been described as prior dogma, Note, *Jurisdiction and Collateral Attack: October Term, 1939,* 40 Colum. L. Rev. 1006, 1007 (1940), and held that a final order of a Bankruptcy Court which was not appealed and which determined subject matter jurisdiction is *res judicata* in a collateral judicial proceeding. The Court specifically declined to examine whether the Bankruptcy Court was right or wrong in determining the extent of its subject matter jurisdiction. *Id.* at 171, n. 8, 172.

The *Stoll* case was reaffirmed in *Treinies v. Sunshine Mining Co.,* 308 U.S. 66 (1939), where the Court clearly stated that unappealed court decisions determining subject matter jurisdiction, even if erroneous, are *res judicata* in collateral court proceedings. *Id.* at 77, n. 21, 78.

In 1940 the Court applied the new "substituted doctrine" of *res judicata,* Note, *supra,* 40 Colum. L. Rev. at 1007, for the first time to an administrative determination. In *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381 (1940), *res judicata* effect prohibiting relitigation of a jurisdictional fact was given to a decision of the National Bituminous Coal Commission, which was affirmed on substantial evidence grounds by the Court of Appeals.

One commentary interprets *Adkins* as limited to the question of whether *res judicata* applies to jurisdictional facts which have been "judicially approved after contest." Note, *supra,* 40 Colum. L. Rev. at 1011-1012. Another considers

Adkins as broader and "applicable to any administrative determination of jurisdiction" because the reviewing court did not decide the jurisdictional question, but determined only that the agency's finding of jurisdictional facts was supported by substantial evidence. 2 Davis, *Administrative Law Treatise,* §18.07 at 594-595, n. 19 (1970).

This Court should resolve the ambiguity created by the decision below and determine whether the full development of the doctrine of *res judicata* should be adopted for administrative adjudicatory proceedings. By reviewing this question, the Court will provide the certainty necessary to litigants who must know whether they can rely in collateral proceedings on the results achieved by prior final administrative orders, without having to protract litigation by confirming such final orders on direct judicial review.

II.

The decision below is in direct conflict with the decision of another Court of Appeals and principles established by other Courts of Appeals on the issue of administrative *res judicata.*

The decision below directly conflicts with a decision of the Third Circuit and principles established by the Second, Seventh, and Ninth Circuits.

The Third Circuit held in *Seatrain Lines, Inc. v. Pennsylvania Ry.,* 207 F.2d 255 (3d Cir. 1953), that a final Commission decision that it lacked subject matter jurisdiction to determine the issue presented, whether that decision was right or wrong, was *res judicata* in a collateral judicial proceeding although the Commission ruling was not subjected to judicial review. *Id.* at 259. *See,* Groner & Sternstein, *Res Judicata and Federal Administrative Law,* 39 Iowa L. Rev. 300, 314 (1954). In reaching this result the Third Circuit relied upon the *Stoll* and *Adkins* cases, *supra,* and adopted the principle there established

for administrative adjudicatory proceedings. The Third Circuit felt "doubly justified" in so acting since the railroad there won the jurisdictional issue in the Commission and attempted to obtain a contrary ruling in the court, as the Fourth Circuit permitted B&A to do below.

Similarly, the decision below conflicts with principles established by the Second, Seventh and Ninth Circuits which have held that parties to agency proceedings which terminate by final order determining jurisdictional facts sufficient to confer subject matter jurisdiction, whether or not the agency order was correct or subjected to direct judicial review, are barred by the doctrine of *res judicata* from relitigating the same issues in collateral judicial proceedings. *Dennison v. Payne,* 293 F. 333 (2d Cir. 1923); *Landreth v. Wabash Ry.*, 153 F.2d 98 (7th Cir. 1946); *Pillsbury v. Alaska Packers Ass'n,* 85 F.2d 758 (9th Cir. 1936).

The conflict among the circuits involves a question so fundamental to the nature of the administrative process and its relationship to judicial proceedings that it should be resolved by this Court.

III.

The decision below has decided two federal questions in conflict with prior decisions of this Court.

The courts below did not express their reason for dismissal of Alco's common law damage claim against B&A and Jubb, and its claim against Jubb, who was not a party to the Commission proceeding, based upon Section 1(4) of the Act. The results, however, conflict with Section 22(1) of the Act, which preserves common law remedies, and prior decisions of this Court.

(1) The dismissal of Alco's claim based on B&A's common law duty to provide transportation service, *Johnson v. Chicago, M., St. P. & Pac. R.R.,* 400 F.2d 968, 971 (9th Cir. 1968), conflicts with the principle established by this Court subsequent to the decision of the Fourth Circuit below in *Nader v. Allegheny Airlines, Inc.,* 44 U.S.L.W. 4803 (U.S. June 7, 1976). There a savings clause "virtually identical" to that appearing in Section 22(1) of the Act was held to preserve common law remedies unless the remedy is "absolutely inconsistent" and cannot "coexist" with the statutory scheme. Alco's common law claim is not inconsistent with Section 9 of the Act, which does not address common law remedies, but provides only for an election of remedies with respect to damage claims based upon its companion, Section 8 of the Act, which provides for damages sustained in consequence of "any . . . violations of the provisions of [Part I of the Act]." 49 U.S.C. §8 (1959).

(2) The dismissal of Alco's claim under Section 1(4) of the Act against Jubb as an aider and abettor conflicts with this Court's decision in *Terminal Warehouse v. Pennsylvania Ry.,* 297 U.S. 500, 511 (1936), which held that the election provision of Section 9 of the Act does not bar an action against an aider and abettor who was not a party to the prior Commission proceeding.

CONCLUSION

This Court should grant the petition for a writ of certiorari to review the issues raised therein on the merits.

Respectfully submitted,

JOHN J. WALSH
EARL H. NEMSER
Attorneys for Petitioner

CADWALADER, WICKERSHAM & TAFT
Of Counsel

Dated: New York, New York
July 16, 1976

APPENDIX A

OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 75-1787

INTERSTATE COMMERCE COMMISSION and ALCO-GRAVURE, INC.,

Appellant,

versus

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY, a corporation, and ELMER J. JUBB,

Appellees.

No. 75-1788

INTERSTATE COMMERCE COMMISSION, ALCO-GRAVURE, INC.,

Appellees,

versus

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY, a corporation, and ELMER J. JUBB,

Appellants.

Appendix A

No. 75-1789

INTERSTATE COMMERCE COMMISSION, ALCO-GRAVURE, INC.,

Appellees,

versus

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY, a corporation, and ELMER J. JUBB,

Appellants.

Appeals from the United States District Court for the District of Maryland, at Baltimore. C. Stanley Blair, District Judge.

Argued March 3, 1976

Decided April 19, 1976

Before CRAVEN, FIELD and WIDENER, Circuit Judges.

Lee A. Monroe (John S. Edwards, Joseph I. Huesman, Lerch and Huesman, and Sidley and Austin on brief) for Appellants in Nos. 75-1788 and 75-1789 and Appellees in No. 75-1787; Daniel S. Linhardt (Dennis M. Hart, Daniel M. O'Donoghue, Bernard A. Gould, Attorneys, Interstate Commerce Commission on brief) for Appellants in No. 75-1787 and Appellees in Nos. 75-1788 and 75-1789; John J. Walsh (Earl H. Nemser on brief) for Appellant in No. 75-1787 and Appellees in Nos. 75-1788 and 75-1789.

Appendix A

PER CURIAM:

The Interstate Commerce Commission (Commission) instituted this action pursuant to 49 U.S.C. § 1(20) against the defendants, The Baltimore and Annapolis Railroad Company (B & A) and its President, Elmer J. Jubb, seeking injunctive relief against B & A for the alleged illegal abandonment of a segment of its railroad running from Clifford Junction in Baltimore City to a point approximately six miles south. Alco-Gravure, Inc. (Alco), a former customer of B & A, was permitted to intervene, and filed its amended complaint with a prayer for damages against B & A based upon common law principles as well as 49 U.S.C. §§ 1(4) and 1(11). In addition to its contest on the merits, B & A filed a motion to stay the action pending the disposition of its application to the Commission under 49 U.S.C. § 1(18) for a certificate permitting abandonment.

Following a hearing the district judge filed an opinion containing his findings of fact and conclusions of law in which he held that B & A's failure to provide rail service on the segment in question constituted an unlawful abandonment within the meaning of Section 1(18) and granted injunctive relief requiring B & A to proceed with the repairs necessary to restore such rail service. With respect to Alco's claim for damages, the district judge concluded that its pursuit of damages in the Commission proceeding constituted an election of remedies under 49 U.S.C. § 9, precluding its assertion of damages in the district court.

Upon consideration of the record, the briefs and oral argument, we affirm upon the opinion of the district judge. *I.C.C. v. Baltimore and Annapolis Railroad Company*, 398 F. Supp. 454 (D.C. Md. 1975).

AFFIRMED.

APPENDIX B

OPINION AND ORDERS OF THE UNITED STATES DISTRICT COURT

INTERSTATE COMMERCE COMMISSION and Alco-Gravure, Inc.

v.

The BALTIMORE AND ANNAPOLIS RAILROAD COMPANY and Elmer J. Jubb.

Civ. No. B-74-786.

United States District Court,
D. Maryland,
Baltimore Division.

April 29, 1975.
Order May 12, 1975.

Daniel S. Linhardt, Interstate Commerce Commission, Washington, D.C.; Earl H. Nemser, New York City, and Francis J. Gorman, Baltimore, Md., for plaintiffs.

Joseph I. Huesman, Baltimore, Md., for defendants.

MEMORANDUM

BLAIR, District Judge.

The Interstate Commerce Commission (ICC) instituted this civil action on July 25, 1974, seeking preliminary and permanent injunctive relief against the defendants, The Baltimore and Annapolis Railroad Company (B & A) and its President, Elmer J. Jubb. Specifically, the ICC seeks to restrain B & A from its

alleged illegal abandonment of a segment of its track that runs from Clifford Junction in Baltimore City to a point approximately six miles south. Shortly after the suit was filed a former customer of B & A, Alco-Gravure, Inc. (Alco), sought to intervene in the action pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. Before a hearing on the motion for preliminary injunction, B & A moved to dismiss or, in the alternative, to stay the proceedings pending the outcome of an application now before the ICC in which it seeks permission to abandon service permanently along its entire route. The hearing was limited, however, solely to the motion for a preliminary injunction and the motion to intervene, and a decision on defendants' motion to dismiss or stay the proceedings was postponed until a hearing on the merits of the permanent injunction could be held.

Testimony and argument on ICC's motion for a preliminary injunction and Alco's motion for leave to intervene were heard August 20-22, 1974. On August 26, this court granted Alco leave to intervene, but denied the request for a preliminary injunction. *I.C.C. v. Baltimore & A.R.R.*, 64 F.R.D. 337 (D. Md. 1974). Alco's complaint alleging violations by defendants of 49 U.S.C. §§ 1(18)-(20) and requesting permanent injunctive relief only was filed the same day.

On August 30, 1974, Alco filed its first amended complaint, which added a prayer for damages based upon common law principles and upon 49 U.S.C. §§ 1(4), 1(11) (1970). Defendants again filed a motion to stay the proceedings pending the outcome of the ICC abandonment proceedings. The decision on this motion was also deferred pending a hearing on the merits of the request for permanent injunctive relief.

On February 21, 1975, defendants answered the complaints of ICC and Alco, and moved to dismiss Alco's request for injunctive relief and damages. Defendants also requested a jury

trial on the issue of damages. With the concurrence of counsel for all parties, the court heard testimony and argument limited solely to the merits of the permanent injunction on March 11, 1975, postponing a ruling on the defendants' motion to dismiss Alco's damage claim.

The facts as found by this court in its opinion of August 26, 1974, denying ICC's motion for a preliminary injunction are adopted for purposes of this decision, except as modified or changed.

Findings of Fact

A. Developments since August 1974 hearing.

At the time of the hearing on ICC's motion for a preliminary injunction in August of 1974, there was pending before an ICC review board a decision on the exceptions taken by both parties to the initial decision of the administrative law judge concerning Alco's complaint before the ICC. The law judge had found B & A in violation of section 1(4) and 1(18) of the act. Based on the violation of 1(4), he had ordered B & A to cancel the temporary embargo and take the necessary steps to restore rail service to Alco. He also ruled, however, that Alco had failed to establish a prima facie case for showing a violation of section 1(11) and that the ICC had no jurisdiction to enforce violations of section 1(18). The filing of the exceptions by both B & A and Alco stayed the effect of the initial decision.

On August 22, 1974, the ICC Review Board rendered its decision on the exceptions. It agreed with the administrative law judge as to his section 1(11) and section 1(18) rulings. However, the Board further ruled that the ICC had no jurisdiction to enforce section 1(4) of the Act. The Board therefore dismissed Alco's complaint. Subsequent to the decision of this court denying ICC's motion for a preliminary injunction, Alco

petitioned the ICC for reconsideration of its earlier decision. This petition was denied on January 16, 1975. Alco has not sought judicial review of the ICC decision.

As to the progress of B & A's abandonment application before the ICC, a draft environment impact statement has now been prepared and a hearing on the abandonment application was to be held April 16, 1975. A final decision by the ICC is expected to take at least six months; in addition, final resolution of B & A's abandonment request could be further delayed by subsequent judicial review. In short, a final decision on B & A's petition for abandonment is not imminent. In the meantime, no repairs to the rail line have been undertaken, and rail service to Alco's Glen Burnie plant has not been restored.

B. Effect of cessation of service upon operation of Alco's Glen Burnie plant.

As of June 30, 1974, Alco had incurred additional costs of $218,000 as a consequence of the loss of B & A's rail service. Since that time this figure has risen by $42,000 to $260,000. Of this total, Alco has passed on $124,000 to various customers in the form of direct billings and absorbed $136,000. Alco's Maryland plant is thus placed at a competitive disadvantage at least as compared to its position before June of 1972 but nevertheless remains profitable and has increased its output substantially since June of 1972.

Because this court denied the ICC's motion for a preliminary injunction, Alco was required to renew its warehouse lease for 1975 at a substantial increase in rent, which is reflected in the figures noted above. However, the lease can be terminated upon thirty days' notice.

C. Costs to restore rail service to Alco's plant.

Appendix B

There are three major cost categories in determining the total expenditure required to restore service to Alco's plant: (1) 4.2 miles of trackage; (2) the bridge over the Patapsco River, including the trackwork thereon; and (3) the bridge over Old Annapolis Road.

The cost of repairs to the trackage was subject to much dispute. Defendants' experts, employees of Rhinehart Railroad Construction, Inc., estimated the costs as of June 1973 to be $187,000 plus contingencies of $37,000, for a total of $224,000, which includes $4,000 for the trackage across the Patapsco River bridge. As of September 1974, these costs had increased to $242,000, plus contingencies of $49,000, for a total of $291,000. This includes $9,800 for track work over the bridge. These figures, however, were not limited to standards for a class one railroad and would allow an operating speed of at least 25 miles per hour, 15-20 miles per hour greater than would be required. They contained no breakdown as to Agnes-related damage. The estimate also assumed new rail would have to be purchased, without considering the use of second-hand rail that B & A owns but which is not currently used.

Alco's expert, Jack D. Storm, based his estimate upon Federal Railroad Administration class one standards for operating speeds of ten miles per hour. His estimate was also broken down into damage caused by Agnes, and conditions existing before Agnes and conditions arising since. Mr. Storm estimated that the total cost of repair of trackage at 1972 prices would have been $32,000, only $700 of which was attributable to Agnes. At 1975 prices, these figures are $43,000 and $1,200 respectively. None of the figures include costs for track work over the bridge. The costs not attributable to Agnes are directly attributable to B & A's failure to expend funds necessary for routine maintenance over the years. Mr. Storm is eminently qualified as an expert in this field, and his painstaking methodology and detailed summaries render his testimony the

Appendix B

most credible. Hence, this court finds as fact the cost figures submitted by Mr. Storm.

The only testimony concerning the cost of bridge repair was provided in the form of expert testimony from a McLean Contracting Co. employee, Mr. G. R. Wentz, called by the defendants in both the preliminary injunction and permanent injunction hearings. As of November 1972, McLean estimated the cost of repair to be $40,000—$45,000. As of June 1973, this cost had risen to $55,000. Neither figure included the cost of design engineering, which could be expected to increase the total by approximately ten percent. As of March 1975, Mr. Wentz estimated the total cost of repair to be $100,000, which includes the consulting engineer's fee for design. None of these figures includes the cost to repair the track work over the bridge.

The November 1972 and June 1973 estimates contained no specific breakdown as to which costs were or were not attributable to Hurricane Agnes. Mr. Wentz stated that deterioration of the concrete supports took place over a period of years but he could not state whether the failure to repair would have caused the final destruction when Agnes swept by. Given the fact that most of the cost to repair the trackage is a result of B & A's conscious policy of deferred maintenance, it is reasonable to infer that such a policy also substantially contributed to the washout of the Patapsco River bridge. Although it cannot be stated with certainty that the bridge would have been operational after Agnes had B & A not failed to perform routine maintenance on the bridge, this court finds that the cost to repair and restore service over the bridge would have been substantially less, even though the final washout was directly attributable to Agnes.

Of the $100,000 figure for March 1975, Mr. Wentz testified that $15,000 is attributable to further deterioration of the bridge since June of 1973 due to lack of maintenance; the remaining $85,000 would therefore represent repair cost attributable to

Agnes and to pre-1972 deferred maintenance, adjusted to reflect 1975 prices.

Defendants' experts submitted the only testimony as to the cost of repairing the bridge over Old Annapolis Road. At 1973 prices, this figure was $3,500, and by 1975 the cost had risen to $9,000 due to inflation and further physical deterioration. None of this cost is attributable to Hurricane Agnes.

In summary, this court finds the 1972 and 1975 cost to restore service on the B & A line to the Alco plant to be as follows: In 1972, the total cost would have been approximately $84,000, of which $35,000 is definitely not attributable to Agnes. Of the remaining $49,000, which involves mostly repairs to the Patapsco River bridge, a substantial portion is not attributable to Agnes, but rather to B & A's failure to perform routine maintenance over the years. At 1975 prices, the total cost of restoring service is approximately $162,000, of which $66,000 is definitely not attributable to Agnes. Of the remaining $96,000, a substantial portion is again attributable to B & A's deferred maintenance policy concerning the Patapsco River bridge.

D. Length of time within which repairs could be completed.

Once the repair work is begun, the testimony was generally agreed that it would take two to three months for completion. However, there was little testimony as to when a contractor could be hired to begin work. Alco's expert, in accordance with his customary practice, would not recommend a contractor. Hence, the only evidence presented as to availability of contractors was that of defendants' track expert, Rhinehard Railroad Construction, Inc. which indicated that Rhinehart would not be available to begin repairs until September 1, 1975. Accordingly, this court finds that repairs would not likely be completed earlier than December 1, 1975.

E. Interests of Anne Arundel County and the Mass Transit Administration of the Maryland Department of Transportation.[1]

During the hearing on the permanent injunction, defendants presented the testimony of a senior planner for the Planning and Zoning Office of Anne Arundel County. The segment of B & A in question in this case lies within that county's border. The county does not feel that B & A is an essential transportation facility, and it is not presently encouraging the establishment along the B & A line of light industry that requires rail service for efficient operation.

The defendants also presented the testimony of the Director of Planning in the Rapid Transit Development Division of the Mass Transit Administration (MTA), Maryland Department of Transportation. The MTA has a plan to acquire the B & A right-of-way and use it for a passenger rail rapid transit system. Accordingly, the MTA has petitioned to intervene in the B & A abandonment proceedings before the ICC. The rapid transit system, however, is still in the planning stage, and no final plan has yet been formally adopted. It is clear that acquisition would not occur in the near future. Further, if B & A's abandonment application were denied, the MTA would revise its plan to include rail freight service.

F. Facts relevant to "abandonment" and B & A's intention to abandon.

It is undisputed that the initial cessation of service in June of 1972 was brought about by a condition over which defendants

---

1. Plaintiffs objected to the admission at this proceeding of the testimony of officials from the MTA and Anne Arundel County claiming it to be irrelevant. The court heard the testimony and reserved ruling on its admissibility. The testimony is hereby admitted.

had no control: Hurricane Agnes. B & A therefore quite reasonably issued a temporary embargo of all rail service south of the Patapsco River. By September of 1972, the flood waters had subsided, and it was then physically possible to repair the damage and restore service.

B & A clearly has the present financial ability to make the repairs necessary to restore service without recourse to outside financing. However, B & A claims a net loss in its railroad operations of $68,000 over the 10-year period preceding its cessation of service to the Alco plant in 1972. B & A's sound financial position has therefore not resulted from the profitability of its rail operations in recent years. The President of B & A feels that B & A's rail service is a "losing proposition," and therefore, as a stock company, B & A does not wish to expend the funds necessary to repair and restore service in an operation that would be unprofitable. Indeed, it has never considered using its own funds to restore service. In addition, B & A has sold portions of its right of way near Annapolis to the State of Maryland, and hopes in the future to sell the remainder to the MTA.

Other than the unfruitful loan negotiations with Alco, B & A has never attempted to obtain outside financial assistance to undertake the repairs and restore rail service to Alco, despite its apparent eligibility to apply for a loan under the Emergency Rail Facilities Restoration Act, Pub.L.No. 92-591, 86 Stat. 1304 (1972).[2]

B & A also has a history of *de facto* abandonments without prior approval from the ICC. In 1968, B & A discontinued

2. Funding for the Act was appropriated on July 1, 1973. Act of July 1, 1973, tit. I, ch. XI, Pub.L.No. 93-50, 87 Stat. 99. The imminence of this funding was called to B & A's attention by counsel for Alco by letter of June 7, 1973. Plaintiffs' Exhibit 9. B & A has never applied for assistance under the Act.

service south of the Severn River because the timber trestle bridge over the river was found to be unsafe. In 1969, B & A discontinued service south of the Alco plant due to a washout at Marley Creek. While the lack of requests for rail service over the abandoned segments may justify the failure to make expenditures to restore service, B & A nevertheless filed no requests with the ICC for permission to abandon until January of 1973, that petition being in large part a response to the filing of an ICC complaint by Alco.

In summary, B & A has long considered its rail operations as a burden, and internal discussions as to the possibility of abandonment were held both before and after Agnes. B & A has long wanted to get out of the rail freight business, and Agnes provided it with a convenient excuse for doing so. B & A has no intention to resume service pending the outcome of its abandonment petition.

Conclusions of Law

This action arises under Sections 1(18) and 1(20) of the Interstate Commerce Act, 49 U.S.C. §§ 1(18), 1(20) (1970). Jurisdiction of this court is properly grounded upon 28 U.S.C. §§ 1337, 1345 (1970), and 49 U.S.C. § 1(20) (1970).

Section 1(18) of the Interstate Commerce Act states, in relevant part:

> . . . [N]o carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

Appendix B

Section 1(20) further provides:

> . . . Any . . . abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of . . . the Commission, . . . or any party in interest . . .

Both the ICC and Alco are authorized to institute suits under section 1(20) without prior resort to ICC administrative hearings. *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 912 (8th Cir. 1974), *cert. denied*, 420 U.S. 972, 95 S.Ct. 1393, 43 L.Ed.2d 652 (1975); *see Powell v. United States*, 300 U.S. 276 (1937); *Meyers v. Jay Street Connecting R.R.*, 259 F.2d 532 (2d Cir. 1958); *Myers v. Arkansas & O. Ry.*, 185 F.Supp. 36 (W.D.Ark. 1960). The doctrine of primary jurisdiction does not apply. *I.C.C. v. Chicago, Rock Island & Pac. R.R., supra* at 913-14; *I.C.C. v. Maine Cent. R.R.*, 505 F.2d 590, 594 (2d Cir. 1974).

It is clear from the Act that no carrier may abandon its operations on all or part of its railroad unless and until the ICC grants a certificate permitting abandonment. 49 U.S.C. § 1(18) (1970). No such certificate has yet been granted to B & A. However, the issue in this proceeding for a permanent injunction under sections 1(18) and 1(20) of the Act is not whether the abandonment should be granted or denied, for that question is for the ICC to decide subject to judicial review. *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 913 (8th Cir. 1974). Rather, the questions for resolution here are (1) whether an "abandonment" has occurred with the meaning of 49 U.S.C. § 1(18), and (2) whether, considering a myriad of equitable factors, an injunction compelling B & A to restore service should issue. *Id.* at 913-14. Simply stated, if there has been an

Appendix B

abandonment, then the court, in its discretion, may issue an injunction restraining such abandonment.

A. Abandonment.

"Abandonment" is defined as a permanent or indefinite cessation of rail service. *Meyers v. Jay Street Connecting R.R.*, 259 F.2d 532, 535 (2d Cir. 1958); *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 911 (8th Cir. 1974). For purposes of sections 1(18) and 1(20), there is no conceptual distinction between discontinuing service permanently and suspending it indefinitely. *Meyers v. Jay Street Connecting R.R., supra* at 535; *I.C.C. v. Maine Cent. R.R.*, 505 F.2d 590, 593 (2d Cir. 1974). However, if the cessation of operations began and continues because of conditions over which the railroad had no control, no abandonment within the meaning of 49 U.S.C. § 1(18) would be established. *I.C.C. v. Chicago, Rock Island & Pac. R.R., supra* at 911; *Zirn v. Hanover Bank*, 215 F.2d 63, 69 (2d Cir. 1954); *Myers v. Arkansas & O. Ry.*, 185 F.Supp. 36, 41 (W.D.Ark.1960); *City of Alexandria v. Chicago, Rock Island & Pac. R.R.*, 311 F.2d 7, 10 (5th Cir. 1962).

Abandonment should be distinguished from the term "embargo," which is issued by the carrier alone and which will justify a cessation of service as a temporary emergency measure when for some reason the carrier is unable to perform its duty as a common carrier. *I.C.C. v. Chicago, Rock Island & Pac. R.R., supra* at 911; *I.C.C. v. Maine Cent. R.R., supra* at 593; 49 C.F.R. § 1006.1 (1974). Because both abandonment and embargo entail a cessation of service, the question of whether an embargo has been transmuted into an unlawful abandonment revolves largely around the length of the cessation and intent of the railroad. *I.C.C. v. Chicago, Rock Island & Pac. R.R., supra* at 911; *I.C.C. v. Maine Cent. R.R., supra* at 593. *See also Williams v. Atlantic Coast Line R.R.*, 17 F.2d 17, 22 (4th Cir. 1927). Here the cessation has continued for nearly three years,

certainly long enough to be an "abandonment" within the meaning of the Act. *See Meyers v. Jay Street Connecting R.R.*, 259 F.2d 532 (2d Cir. 1958); *I.C.C. v. Maine Cent. R.R.*, Civil No. 74-81 (D.Vt., July 18, 1974), *aff'd*, 505 F.2d 590 (2d Cir. 1974). The question is therefore whether B & A has an intent to cease service permanently or indefinitely. This court finds that B & A indeed has such an intent, as evidenced by the following: (1) B & A has the financial ability internally to make the necessary repairs; (2) B & A has never sought outside public or private assistance to finance the repairs; (3) B & A has never even considered using its own funds; (4) B & A has sold off portions of its right of way and hopes to sell off more in the future; (5) B & A has long wanted to rid itself of its railroad operations; (6) B & A has a history of *de facto* abandonments without prior ICC approval; (7) B & A has no intention to resume service pending the outcome of its abandonment petition before the ICC; (8) a substantial portion of the required repair expenditures result from B & A's failure to expend funds for routine maintenance over the years. These facts amply support a finding that B & A intends to abandon its rail operations to Alco's plant. *See I.C.C. v. Maine Cent. R.R.*, 505 F.2d 590, 594 (2d Cir. 1974);[3] *I.C.C. v. St. Johnsburg & Lamoille County R.R.*, Civil No. 73-3 (D.Vt., Feb. 1, 1973); *Pennsylvania v. Penn Cent. Transp. Co.*, 348 F.Supp. 28, 30 (M.D.Pa.1972).

---

3. The lower court decision in *Maine Central*, which was affirmed in the Second Circuit case, stated:

> The extremely lengthy period of discontinuation of service in this case [one year], extending well beyond any reasonable time required to repair the flood damage, coupled with the clear financial and physical ability of the Railroad to repair the damage and resume service must, in our view be construed as an illegal abandonment capable of injunction under 49 U.S.C. § 1(20).

I.C.C. v. Maine Cent. R.R., Civil No. 74-81 at 12 (D.Vt., July 18, 1974), *aff'd*, 505 F.2d 590 (2d Cir. 1974). With respect to the question of abandonment, B & A's position is virtually identical.

B & A, however, contends that the cessation of operation cannot be deemed an unlawful abandonment because it was due to circumstances entirely beyond the control of the railroad, i.e., the occurrence of Hurricane Agnes. It is true that the initial cessation of service was beyond B & A's control because of the physical impossibility of rail operations. Hence, no intent to abandon could be inferred from the initial cessation. However, in order to avoid a finding of abandonment, the cessation must continue to be beyond the control of the railroad. *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 911 (8th Cir. 1974). Hence, once the physical impossibility of service terminates, the cessation of service is no longer "beyond the control" of the railroad, at least where the railroad is financially able to repair the damage. *I.C.C. v. Maine Cent. R.R.*, Civil No. 74-81, at 13 (D.Vt., July 18, 1974), *aff'd* 505 F.2d 590 (2d Cir. 1974); *Pennsylvania v. Penn Cent. Transp. Co.*, 348 F.Supp. 28, 30 (M.D.Pa.1972). Similarly, if the unsafe track conditions have resulted in large part from the railroad's policy of deferred maintenance, the cessation is not deemed "beyond the control" of the railroad. *See I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 911-13 (8th Cir. 1974); *I.C.C. v. Chicago, Rock Island, & Pac. R.R.*, Civil No. CV 73-L-244 (D.Neb., Oct. 31, 1974) (on remand from Eighth Circuit). In this case, it is physically possible to restore service, and B & A has the financial ability to do so. In addition, virtually the entire cost of repairing the track to safe conditions is a result of B & A's longstanding policy of "deferred maintenance." As stated previously with respect to the bridge, it is certainly likely that much of the damage wreaked by Agnes would not have occurred had B & A performed routine maintenance on the bridge over the years. Hence, the current cessation of service cannot be deemed beyond B & A's control. *Myers v. Arkansas & O. Ry.*, 185 F.Supp. 36 (W.D.Ark.1960), is clearly distinguishable from B & A's position, for there the railroad had no right to expend money to repair the bridges and portions of the track, since part of the right of way in question had been condemned by the

United States. In addition, there was no evidence that the railroad was financially able to make the necessary repairs. 185 F.Supp. at 42.

B & A also contends that since the power to nullify an embargo and determine its reasonableness lies only with the ICC, and since the ICC has not seen fit to do so, the embargo is still valid, and therefore the cessation of service cannot be held to be an unlawful abandonment under section 1(18). Other than being a back-door method of invoking the doctrine of primary jurisdiction, which this and other courts reject in cases such as this,[4] B & A's contention in this regard is without merit. If a court finds that an initially valid, self-imposed embargo has over time become an abandonment within the meaning of 49 U.S.C. § 1(18), the mere fact that the embargo is still in effect and unchallenged by the ICC does not render an otherwise unlawful abandonment lawful. The courts have therefore not hesitated to find unlawful abandonments when unchallenged embargoes were still in effect. *See, e.g., I.C.C. v. Maine Cent. R.R.*, 505 F.2d 590 (2d Cir. 1974); *Meyers v. Jay Street Connecting R.R.*, 259 F.2d 532 (2d Cir. 1958).

This court concludes that B & A's failure to restore rail freight service to Alco's plant constitutes an unlawful abandonment within the meaning of Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18) (1970).

B. Whether an injunction should issue.

Plaintiffs contend that once an unlawful abandonment is found, the plaintiffs have an absolute right to a permanent injunction, i.e., the district court has no discretion to deny the

4. *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 913-14 (8th Cir. 1974), *cert. denied*, 420 U.S. 972, 95 S.Ct. 1393, 43 L.Ed.2d 652 (1975); *I.C.C. v. Maine Cent. R.R.*, 505 F.2d 590, 594 (2d Cir. 1974).

injunction based on equitable principles. The short answer to this contention is that the statute itself mandates no such result. Section 1(20) provides that "[a]ny construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section *may* be enjoined . . . ." 49 U.S.C. § 1(20) (1970) (emphasis added). The use of the term "may" clearly contemplates the exercise of discretion by the district courts. *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 914 (8th Cir. 1974).

Alco and the ICC principally rely on the Supreme Court's language in *Texas & Pac. Ry. v. Gulf, C. & S.F. Ry.*, 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578 (1926). In that case, the railroad attempted an extension of its tracks—rather than abandonment—without authorization from the ICC, and the Court held that since "no certificate [had] been obtained, the party in interest opposing construction is entitled as of right to an injunction." 270 U.S. at 273, 46 S.Ct. at 264. The question of a physical impossibility of operation without a substantial expenditure of funds, however, was not present in the *Texas* case. There is a clear distinction between enjoining the expenditure of funds for an extension of operations on the one hand and mandating the expenditure of substantial funds to resume operations on the other. In cases where a court is confronted with a physical impossibility of operation without substantial expenditures for repair, the determination as to whether an injunction should issue should be viewed as one of equity, i.e., "whether it would be equitable to require substantial expenditures when shortly thereafter the Commission may approve the railroad's abandonment application." *I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 914 (8th Cir. 1974). Hence, neither Alco nor the ICC is entitled as of right to an injunction against B & A's unlawful abandonment. The injunction will be issued only if it is equitable to do so under the circumstances. *Id.; Pennsylvania v. Penn Cent. Transp. Co.*, 348 F.Supp. 28, 30 (M.D.Pa.1972); *Asbury v. Chesapeake & O. Ry.*,

264 F.Supp. 437, 438 (D.D.C. 1967); *see I.C.C. v. Maine Cent. R.R.*, 505 F.2d 590, 594 (2d Cir. 1974).

In balancing the equities in cases similar to this, other courts have considered a wide variety of equitable factors, including the relative cost of restoration of service; the progress of the railroad's abandonment application and whether it is likely to be successful; the financial resources of the railroad; the reliance of shippers on rail service and the hardship involved in cessation of that service; the assistance in financing the restoration of service offered by the plaintiff; the extent of responsibility of the railroad for the condition of disrepair; and the public interest generally. *See I.C.C. v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908 (8th Cir. 1974); *I.C.C. v. Maine Cent. R.R.*, Civil No. 74-81 (D.Vt., July 18, 1974), *aff'd*, 505 F.2d 590 (2d Cir. 1974); *I.C.C. v. St. Johnsbury & Lamoille County R.R.*, Civil No. 73-3 (D.Vt., Feb. 1, 1973); *Pennsylvania v. Penn Cent. Transp. Co.*, 348 F.Supp. (M.D.Pa.1972); *Asbury v. Chesapeake & O. Ry.*, 264 F.Supp. 437 (D.D.C.1967).

After consideration of these and other factors, this court believes that the equitable factors balance in favor of granting an injunction enjoining B & A's unlawful abandonment.

First, because of the importance of uninterrupted rail transportation service in the nation's economy, Congress has expressed a clear intent, even to the point of criminal sanctions, that abandonments without prior ICC approval are not tolerated. *See* 49 U.S.C. § 1(20) (1970). B & A has long had an intention to get out of the railroad business, and, indeed, it abandoned approximately two-thirds of its line even prior to the occurrence of Hurricane Agnes in 1972. B & A filed no abandonment application with the ICC until 1973, and that filing was largely only a response to the filing of a complaint with the ICC by Alco. B & A's violation of the statute combined

with the strong Congressional purpose to forbid such violations necessarily weighs most heavily against the equitable position of defendants.

Second, as to the costs to repair the railroad and restore service to Alco, the estimated cost of $162,000 at 1975 prices is certainly a valid equitable factor that tends to favor defendants' position. However, B & A cannot receive equitable advantage of inflationary factors that are included within that figure when it was possible to make the necessary repairs in 1972 at an estimated cost of $84,000. Moreover, the latter figure must be reduced by $35,000 in non-bridge damage attributable to B & A's own pre-1972 deferred maintenance policy. In addition, a substantial but indeterminable portion of the remaining $49,000 cost to repair the Patapsco River bridge is also the result of B & A's deferred maintenance policy. Hence, the cost figure to weigh most heavily on B & A's equitable side is reduced to something less than $49,000. It should again be noted in this regard that in 1972 B & A had, and it presently has, the financial ability to make the necessary repairs. Further, B & A admits that it never even considered using its own funds, or funds publicly available, to do so.

Third, B & A's unlawful cessation of service has placed Alco in an untenable position. Alco's plant, having a value of over ten million dollars, was expressly designed for rail intake of raw paper materials. While the plant has remained a growing and profitable operation, the increased costs since cessation of rail service have been substantial and will continue to be so. The additional costs clearly place Alco at a competitive disadvantage as compared to what its position would have been had B & A not unlawfully ceased operations. Under these circumstances, Alco has suffered and continues to suffer irreparable harm.

Fourth, the delay in contesting B & A's actions before this court probably weighs most heavily against the ICC. The ICC

ignored previous pre-1972 abandonments of the B & A line and ignored the 1972 abandonment until August of 1974, at which time it brought the present action, apparently at the urging of the ICC's own administrative law judge. Alco did pursue its complaint with the ICC almost immediately after it attempted negotiations with B & A for resumption of service in September of 1972. This remedy has proven unfruitful at the Commission level, and for some reason it has not sought judicial review. Either plaintiff could have brought the present action in September 1972, at which time a quick decision could have avoided the additional costs accruing since. Moreover, B & A did make an offer to restore service upon Alco's providing a loan in addition to various guarantees as to continued use of the rail service by Alco. While Alco may have reasonably felt the offer to be unacceptable, it made no reasonable counteroffer and filed a complaint with the ICC without prior notice to B & A. Nevertheless, even though Alco's failure to put up $50,000 in 1972 to aid in restoring service immediately cannot weigh in Alco's favor, B & A cannot equitably be heard to complain that its customer refused to advance the funds necessary to aid in doing that which B & A was otherwise legally bound to do, i.e., cease its unlawful abandonment.

Fifth, as stated in this court's previous opinion, the ICC delay in the processing of B & A's abandonment application caused by ICC's own actions in response to the decision in *Harlem Valley Transp. Ass'n v. Stafford,* 360 F. Supp. 1057 (S.D.N.Y. 1973), *aff'd,* 500 F.2d 328 (2d Cir. 1974), substantially undermines the equitable position of the ICC as a plaintiff in this case. This court is naturally reluctant to order substantial expenditures on the B & A line when there is a possibility that ICC would authorize abandonment, even though a final decision may not be forthcoming for a year or more. On the other hand, the only indication in this case as to the outcome of B & A's abandonment petition before the ICC was given by the ICC administrative law judge, who, in ruling on Alco's complaint,

stated that the circumstances surrounding B & A's current position could never qualify for abandonment. Moreover, the ICC delay in ruling on the B & A abandonment cannot be attributed in any manner to fault on the part of Alco. Finally, B & A may have avoided much of the administrative delay, as well as the possibility of unnecessary expenditures for repair, had it petitioned for abandonment when it ceased operations. B & A would then have been either granted abandonment or ordered to continue service, and this proceeding would have been, in all probability, unnecessary.

Sixth, as to considerations of the public interest in the grant or denial of a permanent injunction, it is clear that Alco is presently B & A's only substantial prospective customer south of the Patapsco River. This court has also considered the interests expressed by the MTA and Anne Arundel County in this case. These interests, however, weigh only slightly, if at all, in favor of B & A's position. The plans of the MTA are very tentative and depend to a large extent upon the outcome of B & A's abandonment application. The position of Anne Arundel County as presented in testimony before this court appears to be merely one of indifference as to the continued existence of rail freight service on the B & A line.

After consideration of the law, the evidence, and the balance of the equities, and giving greatest weight to the first three factors enumerated above, this court concludes that a permanent injunction should issue requiring B & A to restore rail freight service to Alco's Glen Burnie plant. Counsel for ICC and Alco shall submit, after consultation with counsel for B & A, an appropriate order in accordance with this opinion. Defendants' motion to dismiss or stay these proceedings until a decision on B & A's petition for abandonment now pending before the ICC will accordingly be denied.

Appendix B

Alco's Claim for Damages

In its complaint filed with the ICC contesting B & A's cessation of service, Alco also sought damages pursuant to 49 U.S.C. §§ 8, 9, 16(1) (1970), based upon alleged violations of 49 U.S.C. §§ 1(4), 1(11), 1(18) (1970). As previously noted, the administrative judge found that B & A had violated sections 1(4) and 1(18), but that Alco had failed to establish a prima facie case with respect to section 1(11). The judge ruled that the ICC had no jurisdiction to enforce section 1(18), but he did order B & A to cancel its temporary embargo and restore service to Alco, finding jurisdiction for such action under section 1(4). The judge declined to award damages, stating no reason for his ruling in that regard. The Commission affirmed the findings concerning sections 1(11) and 1(18), but reversed the administrative judge's ruling that the ICC had jurisdiction to enforce section 1(4), therefore stating that it did not reach the question of damages. The complaint was ordered dismissed. Alco has not sought judicial review of that decision. Instead, it now seeks damages in this court based upon common law principles and upon sections 1(4) and 1(11) of the Interstate Commerce Act, 49 U.S.C. §§ 1(4), 1(11). Alco does not seek damages for any alleged violations of section 1(18).

In a motion to dismiss Alco's claim for damages, B & A contends that Alco is barred from suing in federal court on its claims under sections 1(4) and 1(11) because it has made an election of remedies under 49 U.S.C. § 9 (1970) by proceeding initially before the Commission. Neither party having requested a hearing on the motion to dismiss, the issues will be decided upon consideration of the memoranda presented without oral argument, in accordance with Local Rule 6. For the reasons stated below, B & A's motion to dismiss Alco's claim for damages will be granted.

The Interstate Commerce Act and the common law impose duties upon the railroad to provide and furnish

transportation upon reasonable request therefor and to furnish safe and adequate car service.[5] Under neither the statute nor the common law is the duty to provide transportation and car service absolute.[6] The carrier has a right to issue a temporary embargo in times of emergency,[7] and a validly imposed embargo may therefore be a defense to a damage action under the statute or the common law for failure to provide transportation or car service upon reasonable request.[8] But while the railroad's duty can be qualified or excused by the existence of a valid embargo, the railroad will nevertheless become liable for damages subsequent to the time at which the embargo's validity ceases. *See Chicago & N.W. Ry. v. Union Packing Co.*, 373 F. Supp. 734, 737 (D. Neb. 1974); 49 C.F.R. § 1006.4 (1974). *But see Asbury v. Chesapeake & O. Ry.*, 314 F. Supp. 310 (D.D.C. 1970).

The plaintiff's statutory right to damages for the railroad's violation of its duties under the Interstate Commerce Act is established by 49 U.S.C. § 8 (1970). A consignee, as Alco appears to be in this case, is permitted to recover under Section 8 if he has been injured by a railroad's violation of the Act.

---

5. *See* 49 U.S.C. §§ 1(4), 1(11), 22 (1970); *Johnson v. Chicago, M., St. P. & Pac. R.R.*, 400 F.2d 968, 971 (9th Cir. 1968); *Froehling Supply Co. v. United States*, 194 F.2d 637 (7th Cir. 1952); *See generally Montgomery Ward & Co. v. Northern Pac. Term. Co.*, 128 F.Supp. 475 (D.Or.1953).

6. *Brotherhood of Railway Clerks v. Florida E. Coast Ry.*, 384 U.S. 238, 245, 86 S.Ct. 1420, 16 L.Ed.2d 501 (1966); *Pacific Gamble Robinson Co. v. Minneapolis & St. L. Ry.*, 105 F.Supp. 794, 799 (D.Minn.1952), *aff'd in part and vacated as to damages*, 215 F.2d 126 (8th Cir. 1954).

7. *Chicago & N.W. Ry. v. Union Packing Co.*, 373 F.Supp. 734, 737 (D.Neb.1974); *New York Cent. R.R. v. United States*, 201 F. Supp. 958, 959 (S.D.N.Y.), *vacated as moot*, 371 U.S. 805, 83 S.Ct. 19, 9 L.Ed.2d 51 (1962); *see* 49 C.F.R. § 1006.1 (1974).

8. *Eastern Ry. v. Littlefield*, 237 U.S. 140, 144-45, 35 S.Ct. 489, 59 L.Ed. 878 (1915); *Chicago & N.W. Ry. v. Union Packing Co., supra* at 737.

Adams v. Mills, 286 U.S. 397, 406-08, 52 S.Ct. 589, 76 L.Ed. 1184 (1932). However, section 9 of the Act requires the plaintiff to elect his method of pursuing his claim before either the ICC or a district court, but not both. 49 U.S.C. § 9 (1970).

If the plaintiff elects to proceed initially before the ICC under 49 U.S.C. §§ 9, 13(1), 16(1) (1970), an award of damages is enforceable by a subsequent action in district court before a single district judge. 49 U.S.C. § 16(2) (1970); 28 U.S.C.A. § 1336(a) (Supp. Feb. 1975); *I.C.C. v. Atlantic Coast Line R.R.,* 383 U.S. 576, 585, 86 S.Ct. 1000, 16 L.Ed. 109 (1966). If damages are denied by the Commission or if the plaintiff wishes to challenge the adequacy of any damage award, judicial review is authorized by section 17(9), and the district courts have jurisdiction of the review proceeding under 28 U.S.C. § 1336 (1970).[9] *I.C.C. v. Atlantic Coast Line R.R., supra,* 383 U.S. at 587, 86 S.Ct. 1000.

The plaintiff's initial option to recover his damages in district court rather before the Commission has been somewhat limited by the development and application of the doctrine of primary jurisdiction,[10] especially in cases where a question concerning the validity or reasonableness of a carrier's embargo is involved.[11] The primary jurisdiction doctrine applies

9. This judicial review procedure has been altered by the Act of Jan. 2, 1975, Pub.L.No. 93-584, 88 Stat. 1917, *amending* 28 U.S.C. §§ 1336, 1398, 2323-25, 2341-42 (1970). Under this Act, the courts of appeals now have exclusive jurisdiction to enjoin, set aside, suspend, or determine the validity of all orders of the ICC other than for the payment of money. *See* 28 U.S.C.A. §§ 1336(a), 2321(a), 2342(5) (Supp.Feb.1975). The Act does not apply to actions commenced on or before March 31, 1975.

10. *United States v. I.C.C.,* 337 U.S. 426, 439, 69 S.Ct. 1410, 93 L.Ed. 1451 (1949). *See generally* 3 K. Davis, *Administrative Law Treatise* § 19.02 (1957).

11. *Chicago & N.W. Ry. v. Union Packing Co.,* 373 F.Supp. 734, 737 (D.Neb.1974); *Asbury v. Chesapeake & O. Ry.,* 314 F.Supp. 310 (D.D.C.1970); *Holt*

(Cont'd)

whenever enforcement of a claim, originally cognizable in the courts, requires the resolution of issues that have been placed within the special competence of an administrative body in accordance with the purposes of a regulatory scheme. *United States v. Western Pac. R.R.,* 352 U.S. 59, 65, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956). Whether the purposes of the Interstate Commerce Act require that the ICC should first pass on a question depends on whether the question raises issues of transportation policy that should be considered by the Commission in the interests of uniformity and administrative expertise. *Id.* at 65, 77 S.Ct. 161. *See generally* 3 K. Davis, *Administrative Law Treatise* § 19.02 (1957) [hereinafter cited as K. Davis]; *Great N. Ry. v. Merchants' Elev. Co.,* 259 U.S. 285, 292, 42 S.Ct. 477, 66 L.Ed. 943 (1922).

Whenever the doctrine of primary jurisdiction requires that administrative questions be decided first by the ICC, the district court must refer[12] such questions to the Commission[13] even if the ICC has no power to award damages or otherwise grant the relief sought,[14] and even if plaintiff has also alleged a

(Cont'd)

Motor Co. v. Nicholson Universal S.S. Co., 56 F.Supp. 585, 591-92 (D.Minn.1944); *see Pennsylvania R.R. v. Puritan Coal Mining Co.,* 237 U.S. 121, 133-34, 35 S.Ct. 484, 59 L.Ed. 867 (1915); *Eastern Ry. v. Littlefield,* 237 U.S. 140, 35 S.Ct. 489, 59 L.Ed. 878 (1915). *See also New York Cent. R.R. v. United States,* 201 F.Supp. 958, 959 (S.D.N.Y.), *vacated as moot,* 371 U.S. 805, 83 S.Ct. 19, 9 L.Ed.2d 51 (1962).

12. When a referral occurs, the court ordering the reference has exclusive jurisdiction of any civil action to review any ICC order arising out of the referral. 28 U.S.C. § 1336(b) (1970).

13. *I.C.C. v. Atlantic Coast Line R.R.,* 383 U.S. 576, 579-80, 86 S.Ct. 1000, 16 L.Ed.2d 109 (1966).

14. 3 K. Davis § 19.07, at 39-41; *Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc.,* 371 U.S. 84, 89, 83 S.Ct. 157, 9 L.Ed.2d 142 (1962); see *Thompson v. Texas Mexican Ry.,* 328 U.S. 134, 151, 66 S.Ct. 937, 90 L.Ed. 1132 (1946).

violation of the railroad's duties under the common law.[15] The question of whether the primary jurisdiction doctrine requires a referral in this case need not be decided, however, because this court believes that Alco, by initially seeking damages before the Commission, is no longer entitled to maintain another action for damages in this court.

It is clear that once a plaintiff's claim is denied on the merits before the ICC, such denial having become a final order, section 9 prohibits an action in district court on the same claim. *See United States v. I.C.C.*, 337 U.S. 426, 434, 69 S.Ct. 1410, 93 L.Ed. 1451 (1949); 49 U.S.C. § 9 (1970). Here, the Commission held that Alco had failed to establish a prima facie case as to its claim under section 1(11) — clearly a decision on the merits. Hence, Alco has elected its remedy with the Commission, and the section 1(11) claim is therefore barred in this court. *See United States v. Kansas City S. Ry.*, 217 F.2d 763, 771 (8th Cir. 1954).

However, the Commission did not decide Alco's claim under section 1(4) on its merits, finding that it had no jurisdiction to do so. Hence, the question is whether Alco, having not appealed to test the correctness of the Commission's decision, has nevertheless elected its remedy within the meaning of section 9.

An examination of court decisions reveals that the question of the Commission's jurisdiction to award damages for a carrier's violation of its duty under 49 U.S.C. § 1(4) is unsettled, at least where the requested transportation equipment is already

15. *See Midland Valley R.R. v. Barkley*, 276 U.S. 482, 48 S.Ct. 342, 72 L.Ed. 664 (1928); *Taylor County Sand Co. v. Seaboard Coast Line R.R.*, 446 F.2d 853, 855 (5th Cir. 1971).

owned by the carrier.[16] If the Commission's ruling as to its jurisdiction is incorrect, Alco clearly should have sought judicial review of the denial of damages, since a favorable ruling thereupon would have preserved Alco's administrative remedy. But since Alco has not appealed, the ineffectiveness of the remedy would be due to its own inaction. Hence, if the ICC does have jurisdiction to enforce section 1(4), Alco should be found to have made a binding election, because its chosen remedy would have been adequate had it pursued that choice to the fullest.

On the other hand, if an appeal had confirmed that the Commission is indeed without jurisdiction to award damages under section 1(4), the court might be more sympathetic to Alco's plea to assert its damage claim in court despite its contrary reading of the law, since it would seem that the pursuit of a nonexistent remedy could not constitute an election with the meaning of section 9. But Alco has foregone its opportunity to have the existence of its ICC remedy judicially determined through the established procedures for judicial review. This court believes that, in the face of unsettled law as to the availability of a remedy, the policy behind section 9 requires Alco to pursue its chosen course to the fullest extent before it will be found not to have made a binding election due to the inadequacy of the remedy it selected. For whatever reason, Alco decided not to pursue fully its initial choice. Alco therefore should not be allowed to begin again in another forum.

Equally important in this case, however, is the interest of the parties and of the public that litigation concerning a single

16. *Compare I.C.C. v. Baltimore & A.R.R.*, 64 F.R.D. 337, 345 (D.Md.1974); *Asbury v. Chesapeake & O. Ry.*, 314 F.Supp. 310 (D.D.C.1970), *and New York Cent. R.R. v. United States*, 201 F.Supp. 958, 959 (S.D.N.Y.), *vacated as moot*, 371 U.S. 805, 83 S.Ct. 19, 9 L.Ed.2d 51 (1962), *with United States v. Pennsylvania R.R.*, 242 U.S. 208, 226-27, 37 S.Ct. 95, 61 L.Ed. 251 (1916) and *Duralite Co. v. Erie Lackawanna Ry.*, 339 I.C.C. 312, 314 (1971).

set of circumstances should stop at some point.[17] Because the statutory duties imposed upon carrier by the Interstate Commerce Act are overlapping to a great extent, *see, e.g.*, 49 U.S.C. §§ 1(4), 1(6), 1(9), 1(11), 1(12), 1(18), 3(1), 6(1), 15(1) (1970), a particular set of facts could conceivably establish a violation of any number of them. Alco therefore could have invoked the ICC's reparations jurisdiction under section 16(1) by alleging B & A's violation of one or more other sections of the Act, for it is settled that the ICC, apart from section 1(4), has the power to determine the reasonableness or validity of an embargo.[18] Alco chose not to assert violations of other sections before the ICC but instead seeks damages under section 1(4) here. This court, in all probability, would be required to refer the matter back to the ICC for its primary jurisdiction determination as to the reasonableness of the embargo under another section of the Act. *Holt Motor Co. v. Nicholson Universal S.S. Co., supra* at 591-92; *see Chicago & N.W. Ry. v. Union Packing Co., supra* at 737. In effect, this would permit

17. In addition to Alco's ICC complaint, two other proceedings on the same set of facts have been brought: this proceeding for damages and permanent injunctive relief, and B & A's abandonment application now pending before the ICC. All are subject to appellate review. Further, a full hearing was previously held by this court on ICC's motion for a preliminary injunction. Were this court to refer the current action to the ICC under the doctrine of primary jurisdiction, another hearing and administrative appeal would be held, again followed by judicial review. The application of the ICC's final order (assuming no reversal for further administrative proceedings) to this action would require further proceedings here, subject to appellate review. Hence, were this court not to dismiss Alco's claim, there could be a total of at least six plenary hearings, three administrative appellate proceedings, and nine separate judicial review proceedings (including possible Supreme Court review) all on the same set of facts.

18. *Asbury v. Chesapeake & O. Ry.*, 314 F. Supp. 310, 313 (D.D.C.1970); *New York Cent. R.R. v. United States, supra* at 959; *Baltimore Chamber of Commerce v. Baltimore & O.R.R.*, 45 I.C.C. 40, 51 (1917); *see Chicago & N.W. Ry. v. Union Packing Co., supra* at 737; 49 U.S.C. §§ 1(6), 13(2), 15(1) (1970); *American Mfg. Co. v. Director General*, 77 I.C.C. 52 (1922); *cf. Holt Motor Co. v. Nicholson Universal S.S. Co., supra* at 591-92; *New Orleans v. Traffic & Transp. Bureau v. Mississippi Valley Barge Line Co.*, 280 I.C.C. 105 (1951). *See also United States v. Kansas City S. Ry.*, 217 F.2d 763, 771 (8th Cir. 1954).

Alco to assert a second claim on the same set of facts in a second action before the Commission without having sought an appeal on the first. The logical extension of permitting this result would be to allow a plaintiff that has lost its case under one section to return to the ICC to seek relief upon the same set of facts under a second section, and, if the plaintiff loses again, to seek the same relief later under a third.[19]

Litigation must end somewhere. To allow a plaintiff to shuttle back and forth between the ICC and the courts asserting new claims each time would be not only inequitable to the defendant, but contrary to the purposes of section 9 of the Interstate Commerce Act. By requiring a plaintiff who brings an action under section 9 to assert *all* its claims in one action in the forum of its choice, the endless "renvoi" will never begin. In this case, Alco had the opportunity to assert all its claims before the Commission but chose not to do so. Hence, Alco, has elected its damage remedy before the Commission within the meaning of section 9. Accordingly, its claim is barred in this court. 49 U.S.C. § 9 (1970). *See also United States v. I.C.C.*, 337 U.S. 426, 434, 69 S.Ct. 1410, 93 L.Ed. 1451 (1949); *Asbury v. Chesapeake & O. Ry.*, 314 F.Supp. 310, 313 (D.D.C.1970). The defendants' motion to dismiss Alco's damage claim will be granted.

An appropriate order will be entered separately.

ORDER

For the reasons stated by this court in the Memorandum of even date, it is this 29th day of April 1975, by the United States District Court for the District of Maryland, ordered:

19. And since the legal claims, theories, and issues may be different each time, strict principles of res judicata may not apply. *See* 2 K. Davis § 18.01-.02.

1. That the motions of defendants to dismiss or in the alternative to stay the action for permanent injunctive relief be, and the same hereby are, denied.

2. That the motion of defendants to dismiss the claim of plaintiff Alco-Gravure, Inc. for damages be, and the same hereby is, granted.

The Clerk shall mail a copy of this Order together with a copy of the Memorandum of even date to counsel for all parties.

ORDER

For the reasons stated by this court in the Memorandum of April 29, 1975, it is this 12th day of May, 1975, by the United States District Court for the District of Maryland, ordered:

1. That the defendants are enjoined from further violation of 49 U.S.C. § 1(18) in regard to the abandonment of the operations of a line of railroad, that runs from Clifford Junction in Baltimore City to a point approximately six miles south, so that rail service can be restored to plaintiff Alco-Gravure, Inc. in Glen Burnie unless and until defendant, The Baltimore and Annapolis Railroad Company, has received a certificate of public convenience and necessity from the Interstate Commerce Commission authorizing such abandonment;

2. That defendants shall proceed forthwith to effect sufficient repairs necessary to restore, continue and sustain rail service to plaintiff Alco-Gravure, Inc. within Federal Railroad Administration Class 1 standards at speeds of ten miles per hour unless and until such certificate is obtained;

3. That not more than thirty days from the date of this Order defendants shall file with this court and serve upon plaintiffs a comprehensive plan for the work to be done to

restore service including a time schedule for completion of the various phases of the work, an expected final completion date for all of the work, and the persons, firms or corporations engaged or to be engaged to perform the various phases of the work, and each two weeks thereafter shall file with the court and serve upon plaintiffs a report of the work completed together with any requests for revision of the plan earlier filed; that these reports will terminate upon restoration of service, but further action by this court will be predicated thereon if satisfactory progress is not timely made toward such restoration of service;

4. That defendants shall give due consideration in the selection of contractors for any or all of the work to persons, firms or corporations able to commence and complete the work without undue delay.

APPENDIX C

INTERSTATE COMMERCE ACT

Sections 1(4), 8, and 22, 49 U.S.C. §§ 1(4), 8, 9, and 22(1)

§ 1, par. (4). Duty to furnish transportation and establish through routes; division of joint rates. It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June 18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 2(c), 54 Stat. 899.

§ 8. Liability in damages to persons injured by violation of law.

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this

chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. Feb. 4, 1887, c. 104, Pt. I, § 8, 24 Stat. 382; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

9. Remedies of persons damaged; election; witnesses

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit. Feb. 4, 1887, c. 104, Pt. I, § 9, 24 Stat. 382; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 9, 1935, c. 498, §1, 49 Stat. 543; Oct. 15, 1970, Pub. L. 91-452, Title II, § 243(a), 84 Stat. 931.

§ 22. Restrictions; quotations of rates for United States Government

(1) Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the

United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the transportation of persons for the United States Government free or at reduced rates, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this chapter shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of Veterans' Administration facilities or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this chapter shall be construed to prohibit any common carrier from establishing by publication and filing in the manner prescribed in section 6 of this title reduced fares for application to the transportation of (a) personnel of United States armed services or of foreign armed services, when such persons are traveling at their own expense, in uniform of those services, and while on official leave, furlough, or pass; or (b) persons discharged, retired, or released from United States armed services within thirty days prior to the commencement of such transportation and traveling at their own expense to their homes or other prospective places of abode; nothing in this chapter shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the free carriage, storage, or handling by a carrier of the household goods and other personal effects of its own officers or employees when such goods and effects must necessarily be moved from one place to another as a result of a change in the place of employment of such officers or employees while in the service of the carrier, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; *and*

nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; nothing in this chapter shall be construed to prohibit any common carrier from carrying any totally blind person accompanied by a guide or seeing-eye dog or other guide dog specially trained and educated for that purpose or from carrying a disabled person accompanied by an attendant if such person is disabled to the extent of requiring such attendant, at the usual and ordinary fare charged to one person, under such reasonable regulations as may have been established by the carrier: *Provided,* That no pending litigation shall in any way be affected by this chapter: *Provided further,* That nothing in this chapter shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this chapter, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carrier under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section 6 of this title; and all the provisions of said section relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that

Appendix C

required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section 10 of this title shall apply to any violation of the requirements of this proviso. Nothing in this chapter shall prevent any carrier or carriers subject to this chapter from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the Commission (with or without a hearing); but in any such order the Commission shall (1) define such section, (2) specify the period during which such reduced rates are to remain in effect, and (3) clearly define the class or classes of persons entitled to such reduced rates: *Provided,* That any such order may define the class or classes entitled to such reduced rates as being persons designated as being in distress and in need of relief by agents of the United States or any State authorized to assist in relieving the distress caused by any such calamitous visitation or disaster. No carrier subject to the provisions of this chapter shall be deemed to have violated the provisions of such chapter with respect to undue or unreasonable preference or unjust discrimination by reason of the fact that such carrier extends such reduced rates only to the class or classes of persons defined in the order of the Commission authorizing such reduced rates. (Emphasis supplied.) Feb. 4, 1887, c. 104, Pt. I, §22, 24 Stat. 387; Mar. 2, 1889, c. 382, §9, 25 Stat. 862; Feb. 8, 1889, c. 61, 28 Stat. 643; Aug. 18, 1922, c. 280, 42 Stat. 827; Feb. 26, 1927, c. 217, 44 Stat. 1247; Mar. 4, 1927, c. 510, § 1, 44 Stat. 1446; June 27, 1934, c. 847, Title V, §511, 48 Stat. 1264; Aug. 9, 1935, c. 498, §1, 49 Stat 543; July 5, 1937, c. 432, 50 Stat. 475; Aug. 25, 1937, c. 776, 50 Stat. 809; Sept. 18, 1940, c. 722, Title I, § 3 (c-e), 54 Stat. 900, 901; Sept. 27, 1944, c. 423, 58 Stat. 751; July 27, 1956, c. 759, 70 Stat. 702; Aug. 31, 1957, Pub. L. 85-246, 71 Stat. 564; Sept. 2, 1958, Pub. L. 85-857, § 13 (a), 72 Stat. 1264.

APPENDIX D

FINDINGS AND ORDER OF ADMINISTRATIVE LAW JUDGE

INTERSTATE COMMERCE COMMISSION

Initial Decision

No. 35735

ALCO-GRAVURE, INC.,
FORMERLY PUBLICATION CORPORATION

v.

THE BALTIMORE & ANNAPOLIS RAILROAD COMPANY

Defendant ordered to cancel its temporary embargo and to provide and furnish transportation upon reasonable request therefor to the complainant and other shippers served by its line as required by section 1(4) of the Interstate Commerce Act. Cease and desist order entered. Complaint in all other respects dismissed.

John J. Walsh and *Earl H. Nemser* for complainant. *Joseph I. Huesman* for defendant.

By Warren C. White, Administrative Law Judge:

Findings

Upon consideration of all the evidence of record, the Administrative Law Judge finds that the defendant, The Baltimore & Annapolis Railroad Co., has, through the issuance of a temporary embargo, unlawfully abandoned all operations

Appendix D

over its line in violation of sections 1(4) and 1(18) of the Act; that the Commission lacks jurisdiction under section 1(18) to remedy this wrong and therefore the matter will be referred to the Bureau of Enforcement to bring a court action under section 1(20) seeking an injunction coupled with daily penalties against the continuing violation; that the Baltimore & Annapolis Railroad Co. shall be directed to cancel its temporary embargo, cease and desist from its failure to perform its duty to provide and furnish service to Alco upon reasonable request therefor, initiate application for such emergency loans as may be required for repair of the Patapsco River Bridge and damaged track, and restore service to Alco and other shippers located on the six miles of its track situated between Baltimore and Glen Burnie, Md.; that any impact upon the environment from restoration of rail freight service will be favorable; and that the complaint in all other respects will be denied.

Order

It is the ORDER of the Administrative Law Judge that the complaint, except to the extent granted, be, and it is hereby, dismissed.

It is further ordered, That the Baltimore & Annapolis Railroad Company cancel its temporary embargo, take whatever measures are necessary to restore service, and thereafter be, and it is hereby, notified and required to cease and desist within 30 days of the date this order become effective and thereafter to refrain and abstain from failing to fulfill its duty to provide and furnish transportation upon reasonable request therefor.

And it is further ordered, That, in the absence of a stay or postponement by the Commission or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service hereof.

Appendix D

Dated at Washington, D.C., this 24th day of April, 1974.

By the Commission, Warren C. White, Administrative Law Judge.

ROBERT L. OSWALD,
Secretary

(SEAL)

APPENDIX E

OPINION AND ORDER OF REVIEW BOARD

INTERSTATE COMMERCE COMMISSION

No. 35735

ALCO-GRAVURE, INC., FORMERLY PUBLICATION CORPORATION

v.

THE BALTIMORE & ANNAPOLIS RAILROAD COMPANY

Decided August 22, 1974

Commission held to lack jurisdiction to grant relief for abandonment of a portion of line of defendant and alleged failure to furnish transportation upon reasonable request. Prima facie case not been made for section 1(11) violation. Complaint dismissed.

Earl H. Nemser and *John J. Walsh* for complainant.
Joseph I. Huesman for defendant

REPORT AND ORDER OF THE COMMISSION

REVIEW BOARD NUMBER 4
MEMBERS FITZPATRICK, SHAW, AND FISHER

Appendix E

BY THE BOARD:

This proceeding was consolidated for hearing with abandonment application, No. AB-71, which was filed by defendant, The Baltimore & Annapolis Railroad Company (B&A) on January 11, 1973. However, a subsequent motion of the complainant to separate the proceedings was granted by order served October 5, 1973, and the instant complaint was heard separately.

An initial decision herein by an Administrative Law Judge was served on May 6, 1974, and exceptions and replies were filed by both parties. Our conclusions differ, in part, from those of the Administrative Law Judge. Exceptions and requested findings of fact or law not discussed or referred to in this report, nor reflected in our findings or conclusions, have been considered and found not justified or resolution thereof not necessary for the proper disposition of this proceeding.

Alco-Gravure, Inc., hereinafter called Alco or complainant, filed a motion on July 1, 1974, for expediting the decision on exceptions, to which B&A replied on July 15, 1974. Subsequently, on July 19, 1974, complainant filed a motion for leave to file a reply to defendants' reply. The motion expedition is based on the premise that the Administrative Law Judge's findings will be adopted by us, but we disagree in part with his findings. Therefore, the motion is denied. Complainant's motion for leave to file a reply to a reply is also denied, because a reply to a reply is not permitted by the provisions of rule 23 of the Commission's General Rules of Practice.

By complaint filed on September 26, 1972, Alco alleges that B&A has unlawfully imposed a temporary embargo of its rail freight service to Alco's Glen Burnie, Md., plant on account of the damaged Patapsco River Bridge over which freight cars must

pass to reach Alco's Glen Burnie plant; that defendant is unjustified in refusing to restore service; and that complainant is entitled to orders (1) compelling the B&A to restore rail freight service to Alco, (2) awarding damages to Alco pursuant to sections 8, 9, and 16(1) of the Interstate Commerce Act in an amount equal to the excess costs it has been forced to incur through the necessity of using motor common carriers to deliver freight at its Glen Burnie plant, and (3) directing the B&A to cease and desist in the future from committing violations of sections 1(4), 1(11), and 1(18) of the Act.

Alco is in the business of rotogravure printing, especially Sunday magazine supplements for some large newspapers and advertising circulars for certain major retailers. It has a printing plant at Glen Burnie and, until the cessation of service by the B&A, received most of its deliveries of newsprint and other supplies by rail. The B&A has a 6-mile track connecting the Alco plant with the Baltimore and Ohio Railroad Company (B&O) main line. B&A is a class-II common carrier by railroad and also transports passengers by motor bus under certificates issued by the Commission.

On June 22, 1972, Hurricane Agnes damaged the railroad bridge over the Patapsco River which is located on the B&A's indicated line to Alco's plant. As a result, B&A was not able to continue to provide service to points on the side of the bridge where Alco is located. Thereafter, on June 23, 1972, B&A issued an embargo on service at points on this line, which has continued in effect. Alco alleges that the embargo has been unlawful since September 26, 1972, when it filed the complaint herein. Service on a small portion of defendant's line north of the bridge has resumed.

The parties have never been able to agree on how service can be restored south of the bridge including whether complainant or defendant must initially pay for the necessary

repairs. Direct rail service is desired by complainant because newsprint is more susceptible to damage in motor carrier delivery. Alco estimates that from June 22, 1972, to November 1, 1973, motor carrier delivery of newsprint resulted in damage approximating $110,000, of which $34,000 has not been recouped by complainant and $76,000 of which has been passed on to its customers through higher prices.

Alco also asserts extra costs by motor carrier for drayage from storage warehouses to plant, storage and handling of returns of steel cylinder paper fill cores to particular paper mills, return of rejected paper, rental of equipment for unloading paper rolls, loss of unloading credits, clerical, and paper handling. According to complainant, most of the additional costs incurred by Alco for damaged newsprint and for use of motor carriers could have been avoided if the B&A had promptly restored its rail facilities and resumed service to Alco's Glen Burnie plant.

There is conflicting evidence with respect to the amount of money required to repair the relevant 6 miles of the B&A's right of way, mainly the bridge. Alco claims that it would only cost the B&A approximately $50,000 to make the necessary repairs and to restore service, that the B&A is financially able to do so, and that the cost of repairs is not as great as the damage which the B&A has inflicted on Alco and its customers. Estimates obtained by defendant, however, ranged from $120,000 for the bridge alone to $187,000 for bridge and track repairs.

In his initial decision, the Administrative Law Judge found that the B&A had, through the issuance of a temporary embargo, unlawfully abandoned operations over its line in violation of sections 1(4) and 1(18) of the act, and that there was no showing of violation of section 1(11). In connection with section 1(18), he further found that the Commission lacked jurisdiction and referred the matter to the Commission's Bureau

of Enforcement to file a court action against the defendant. In connection with section 1(4), he found that the Commission has jurisdiction, and he ordered the B&A to cancel its temporary embargo, to take whatever measures are necessary to restore service, and to cease and desist from committing these violations in the future.

The defendant in its exceptions alleges a number of errors were made relating to the facts, including that the Administrative Law Judge should not have considered the verified statements of two witnesses whom complainant failed to produce for cross-examination. Defendant also alleges that the Administrative Law Judge erred in not following the holding in *Duralite Co., Inc. v. Erie Lackawanna Ry. Co.,* 339 I.C.C. 312 (1971), to the effect that the Commission lacked jurisdiction to remedy section 1(4) violations.

Complainant also filed exceptions to the initial decision. It claims that the Administrative Law Judge was in error in not awarding damages to complainant for injuries it suffered as a result of the section 1(4) violation. Complainant also states that the Administrative Law Judge erred in holding that complainant had not made a prima facie case of a section-1(11) violation. Finally, complainant charges that it was error for the Administrative Law Judge to hold that the Commission lacked jurisdiction to enforce section 1(18) of the act, stating that the precedent for this holding, *Powell v. United States,* 300 U.S. 276, is factually distinguishable and that such a result would frustrate the congressional purpose in enacting that section of the act.

DISCUSSION AND CONCLUSIONS

Complainant alleges violations by defendant of sections 1(4), 1(11), and 1(18) of the act. In essence, section 1(4) provides that common carriers are to furnish transportation upon

reasonable request; section 1(11) calls for railroads to furnish safe and adequate car service; and section 1(18) states that a railroad may not abandon a line without obtaining a certificate from the Commission.

We agree with the Administrative Law Judge's findings regarding sections 1(11) and 1(18) of the act. Section 1(11) is concerned with car shortages and fair and equitable distribution of cars; and we affirm the Administrative Law Judge's conclusion that complainant has failed to make a prima facie case with respect to section 1(11) of the act and that the Commission does not have jurisdiction to grant complainant relief under section 1(18) of the act. The entire Commission in *Duralite Co., Inc. v. Erie Lackawanna Ry. Co., supra,* basing its decision on a number of decisions beginning with *Powell v. United States,* 300 U.S. 276 (1937), held:

> "it is well settled that under section 1(20) remedies for violation of section 1(18) must be sought by court action." 339 I.C.C. at 314.

We disagree, however, with the Administrative Law Judge's finding that the Commission has jurisdiction under section 1(4) of the act. The Administrative Law Judge's finding under 1(4) is expressly premised on his disagreement with the decision in *Duralite.* The entire Commission, in *Duralite,* held that the Commission lacks jurisdiction under section 1(4) to grant relief in a factual situation similar to that here involved stating that:

> Based upon the views expressed by the Supreme Court in *United States v. Pennsylvania R. Co.,* 242 U.S. 208 (1916), the Commission has taken the position that enforcement of the railroads' section 1(4) duties, except as entrusted to us by other provisions of the statute, rests with the courts and not with us. See, for example, *Oliver Mfg. Supply Co. v. Reading Co.,* 297 I.C.C. 654 (1956) and cases cited therein. 339 I.C.C. at 314.

Appendix E

The decision in *Duralite* is dispositive of the 1(4) issue here.

Finally, as mentioned previously, complainant raised the issue on exceptions of the failure of the Administrative Law Judge to award damages for violation of section 1(4). We need not reach this issue, since, as seen above, the Commission lacks jurisdiction to enforce section 1(4). Therefore, neither do we consider the allegations relating to an award of damages in connection with sections 8, 9, and 16(1) of the act.

We find, in light of the foregoing, that the complaint should be dismissed.

We further find, that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

IT IS ORDERED, That the complaint filed in this proceeding be, and it is hereby, dismissed.

(SEAL) ROBERT L. OSWALD
Secretary

APPENDIX F

ORDER OF APPELLATE DIVISION

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D.C., on the 16th day of January, 1974.

No. 35735

ALCO-GRAVURE, INC., FORMERLY PUBLICATION CORPORATION

v.

THE BALTIMORE & ANNAPOLIS RAILROAD COMPANY

Upon consideration of the record in this proceeding, of the petition for reconsideration filed October 15, 1974, by complainant, and the reply thereto filed by defendant on October 31, 1974;

It is ordered, That the petition be, and it is hereby, denied for the reason that sufficient grounds have not been shown to warrant granting the action sought.

By the Commission, Division 2, acting as an Appellate Division.

(SEAL) ROBERT L. OSWALD,
Secretary

Supreme Court, U. S.
FILED
AUG 18 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-64

ALCO-GRAVURE, INC.,
Appellant Below and Petitioner,

vs.

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY AND ELMER J. JUBB,
Appellees Below and Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LEE A. MONROE
1730 Pennsylvania Avenue, N.W.
Washington, D. C. 20006
(202) 872-1730

Attorney for Respondents

Of Counsel:

SIDLEY & AUSTIN
1730 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
Statement of the Case	2
Argument	5
I. THE FOURTH CIRCUIT DECISION DOES NOT RAISE QUESTIONS WHICH NEED BE SETTLED BY THIS COURT	8
A. Any "Procedural Dilemma" Was Entirely Of Petitioner's Own Making And Within Its Power To Resolve	9
B. *Res Judicata* Has No Application To The Circumstances Of This Case	10
II. THE FOURTH CIRCUIT DECISION IS NOT IN CONFLICT WITH DECISIONS AND PRINCIPLES OF OTHER COURTS OF APPEALS	13
III. THE FOURTH CIRCUIT DECISION IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT	16
A. Dismissal Of Petitioner's Damage Claim Is Not In Conflict With *Nader* v. *Allegheny Airlines*	16
B. Dismissal Of Petitioner's Damage Claim Against Respondent Jubb Is In No Way In Conflict With *Terminal Warehouse* v. *Pennsylvania R. Co.*	17
Conclusion	20

TABLE OF AUTHORITIES

Cases: Page

Asbury v. Chesapeake and Ohio Railway Company, 314 F.Supp. 310 (D.D.C. 1970) 8, 9, 10
Brooks-Scanlon Co. v. Railroad Commission, 251 U.S. 396 (1920) 5
Dennison v. Payne, 293 F. 333 (2d Cir. 1923) 14
Duralite Co., Inc. v. Erie Lackawanna Ry. Co., 339 I.C.C. 312 (1971) 6, 7
Harlem Valley Transportation Ass'n v. Stafford, 360 F.Supp. 1057 (S.D.N.Y. 1973), *aff'd* 500 F.2d 328 (2d Cir. 1974) 3
Interstate Commerce Comm'n v. Baltimore & Ann. R.R. Co., 64 F.R.D. 337 (D.Md. 1974) 4
Johnson v. Chicago, M., St. P. & P. R.R., 400 F.2d 968 (9th Cir. 1968) 19
Landreth v. Wabash R. Co., 153 F.2d 98 (7th Cir. 1946) 14, 15
Nader v. Allegheny Airlines, Inc., 44 U.S.L.W. 4803 (U.S. June 7, 1976) 16, 17
Neirbo v. Bethlehem Shipbuilding Corporation, 308 U.S. 165 (1939) 11
New York Central Railroad Company v. United States, 201 F.Supp. 958 (S.D.N.Y. 1962) 7
Pennsylvania R. Co. v. Sonman S.C. Co., 242 U.S. 208 (1916) 17
Pillsbury v. Alaska Packers Ass'n, 85 F.2d 758 (9th Cir. 1936) 14, 15
Seatrain Lines, Inc. v. Pennsylvania Ry., 207 F.2d 255 (3rd Cir. 1953) 13
Standard Oil Co. v. United States, 283 U.S. 235 (1931) 11
Stoll v. Gottlieb, 305 U.S. 165 (1938) 11
Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) 11, 12
Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U.S. 500 (1936) 16, 18, 19
Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) 11, 12

TABLE OF AUTHORITIES—Continued

Page

United States v. Pennsylvania R. Co., 242 U.S. 208 (1916) 17
United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966) 11

Statutes and Rules:

Interstate Commerce Act, 49 U.S.C.:

Section 1(4) ..... *passim*
Section 1(11) ..... *passim*
Section 1(18) ..... *passim*
Section 9 ..... *passim*
Section 17(1) 4

Interstate Commerce Commission's General Rules of Practice, 49 C.F.R. Part 1100:

Rule 101 7

Judiciary and Judicial Procedure, 28 U.S.C.:

Section 2341 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-64

ALCO-GRAVURE, INC.,
Appellant Below and Petitioner,

vs.

THE BALTIMORE AND ANNAPOLIS RAILROAD COMPANY AND ELMER J. JUBB,
Appellees Below and Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Alco-Gravure, Inc. (Alco), seeks this Court's review of a decision of the United States Court of Appeals for the Fourth Circuit affirming *per curiam* the dismissal by the United States District Court for the District of Maryland of its claim for damages allegedly arising from the cessation of the rail service of Respondent, Baltimore and Annapolis Railroad Company (B&A).[1] The District Court dismissed on the ground that Alco, having initiated

---

[1] Respondents have filed a Petition for a Writ of Certiorari in respect of the Fourth Circuit's simultaneous affirmance of the District Court's finding, resulting in the issuance of a mandatory injunction, that cessation of B&A rail service was in violation of the Interstate Commerce Act (October Term, 1976—No. 76-78). Respondents submit this if this Court is to review the dismissal of Alco's damage claim it should consider also the finding below that cessation of B&A rail service constituted a violation of the act, as such finding forms the basis of both the damage claim and the injunctive order.

its damage claim in the first instance by complaint to the Interstate Commerce Commission (the Commission), was precluded by Section 9 of the Interstate Commerce Act (49 U.S.C. § 9) from thereafter prosecuting that claim in court.

As will be shown herein, the dismissal of Petitioner's damage claim was entirely proper; and Petitioner has failed to establish special and important reasons for invoking this Court's jurisdiction on writ of certiorari.

Statement of the Case

Prior to June of 1972, B&A, whose principal business is the charter bus business, operated a six-mile line of railroad between Baltimore and Glen Burnie, Maryland. On June 23, 1972, tropical storm "Agnes" destroyed the Patapsco River Bridge over which B&A operated that line of railroad. B&A promptly secured estimates indicating that the cost of repairing the Bridge, as well as segments of track which had been washed out, would be in excess of $100,000.

Because the railroad was a deficit operation, sustaining a net loss of $46,171 during the period 1963-1971, B&A management knew that an expenditure of that magnitude could not be economically justified. B&A therefore sought the financial assistance of Alco, the only rail user of any consequence south of the Patapsco River. Discussions with Alco focused on the possibility of a $50,000 loan, secured by a first mortgage on B&A's right of way. B&A also had discussions with the Baltimore and Ohio Railroad (with which it connects at the north end of its line), exploring the possibility that the B&O take over all or a portion of B&A's rail operation.

All such discussions terminated when Alco filed with the Commission a complaint seeking an order compelling B&A to restore rail service and an award of damages for

violation of Sections 1(4), 1(11) and 1(18) of the Act.[2] B&A had no choice at that point but to seek Commission authorization to abandon rail operations, which it did by application filed January 11, 1973.

B&A's abandonment application was consolidated with Alco's complaint and the consolidated proceedings were to be heard in early July 1973. However, on June 21, 1973, the United States District Court for the Southern District of New York ruled that the Commission must at the outset of all abandonment proceedings determine whether "major Federal actions significantly affecting the quality of the human environment" are involved within the meaning of the National Environmental Policy Act of 1969. *Harlem Valley Transportation Ass'n.* v. *Stafford*, 360 F.Supp. 1057 (S.D.N.Y. 1973), *aff'd* 500 F.2d 328 (2d Cir. 1974). This ruling resulted in an indefinite postponement of B&A's abandonment case, as well as many other abandonment cases then pending, while the Commission assembled the staff necessary to prepare the required environmental impact statements.

Alco's complaint was severed from B&A's abandonment application and proceeded to hearings in November of 1973. On May 6, 1974, the Administrative Law Judge who presided at those hearings issued an Initial Decision in which he concluded that B&A had, "through the issuance of a temporary embargo, unlawfully abandoned all operations over its line in violation of section 1(4) and 1(18) of the [Interstate Commerce] Act," ordering it to cancel its embargo and to restore service. However, because "the Commission lacks jurisdiction under section

---

[2] Section 1(4) imposes a duty on every common carrier to provide transportation upon reasonable request therefor (49 U.S.C. § 1(4)); Section 1(11) imposes a duty to furnish safe and adequate car service (49 U.S.C. § 1(11); and Section 1(18) provides that no railroad shall abandon a line of railroad, or operations thereover, without having obtained an appropriate certificate from the Commission (49 U.S.C. § 1(18)).

1(18) to remedy this wrong . . . the matter will be referred to the Bureau of Enforcement to bring a court action under section 1(20) seeking an injunction." The Administrative Law Judge also found that there had been no showing of a violation of Section 1(11).

The recommended court action was instituted by the Interstate Commerce Commission on July 25, 1974 in the United States District Court for the District of Maryland. On September 26, 1974, following hearings, that court granted Alco's motion for leave to intervene, but denied the Commission's request for a preliminary injunction. *Interstate Commerce Comm'n.* v. *Baltimore & Ann. R.R. Co.*, 64 F.R.D. 337 (D.Md. 1974).

On August 22, 1974, the Commission's Review Board No. 4 affirmed the Administrative Law Judge's findings that Alco had failed to show a violation of Section 1(11) and his holding that the Commission lacked jurisdiction to enforce Section 1(18), but reversed his conclusion that the Commission had jurisdiction to enforce Section 1(4). On January 16, 1975, Division 2 of the Commission denied Alco's petition for reconsideration of the decision of Review Board No. 4.[3]

On August 30, 1974, shortly after the decision of Review Board No. 4 and well before the decision of Division 2, Alco amended its complaint for injunctive relief in the District Court to include its claim for damages.

On March 11, 1975, the District Court heard testimony and argument directed to the merits of the permanent injunction requested both by the Commission and by Alco. On April 29, 1975, the District Court issued a Memorandum (Petition, App. B) in which it concluded (1) that B&A had unlawfully abandoned operations over its line of railroad and that even though B&A's applica-

[3] A division of the Commission consists of three of the eleven Commissioners (see 49 U.S.C. §17(1)).

tion for authority to abandon had become disentangled from environmental delays and was then in the hearing stage, a permanent mandatory injunction, requiring it to restore service over a six-mile segment to Alco's plant, should issue, and (2) that Alco's damage claim should be dismissed.

On April 19, 1976, the Fourth Circuit affirmed the District Court in both respects.[4]

Argument

Section 9 of the Act provides that any person claiming to be damaged by any common carrier may make complaint to the Commission or bring suit in federal court, but "must in each case elect which one of the two methods of procedure herein provided for he or they will adopt" (49 U.S.C. § 9; Petition, p. 35a).

In September 1972, Alco considered itself damaged by the cessation of B&A rail service to its plant. It decided to seek recovery of damages and it elected to adopt the procedure of making complaint to the Commission. Section 9 clearly applies so as to preclude Alco's subsequent efforts to bring its damage claim in federal court. The District Court and the Fourth Circuit so concluded, and properly so.

[4] B&A did not initially intend to seek this Court's review of the Fourth Circuit's affirmance of the mandatory injunction, as the denial by Mr. Chief Justice Burger on May 6, 1976, of B&A's application for a stay meant that the railroad would have been rehabilitated and service restored long before a decision by this Court could be obtained. In that circumstance, B&A's claim that the issuance of that injunction violated principles announced by this Court in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920), would have been largely academic. B&A believed the litigation to be at an end. However, when B&A received on the last possible day Alco's petition for a writ of certiorari in respect of its damage claim, B&A promptly filed its petition for a writ of certiorari in respect of the findings of violation of the Act which form the basis of both the injunctive order and the damage claim.

Alco attempts to avoid the application of Section 9 by contending that because Division 2 of the Commission held that it lacked jurisdiction to award Alco damages for violation of Section 1(4), as well as Section 1(18), Alco's remedy at the Commission was nonexistent and for that reason it cannot be deemed to have made an election. Alco's claim that its remedy at the Commission was nonexistent is unfounded; its failure to recover damages in that forum was due to its own decisions.

On March 16, 1971, some eighteen months before Alco made complaint to the Commission, a sharply divided Commission issued a decision in which the majority concluded that the Commission lacks jurisdiction to enforce the duty imposed upon carriers by Section 1(4) of the Act—to provide transportation upon reasonable request therefor—and dismissed a shipper's claim of damages for violation of that section. *Duralite Co., Inc.* v. *Erie Lackawanna Ry. Co.*, 339 I.C.C. 312 (1971). There were four dissenting Commissioners, each of whom believed that the Commission did have power to enforce a carrier's Section 1(4) duty.

Alco must be presumed to have been aware of the *Duralite* decision and to have concluded that it was incorrectly decided or that, in view of the strong dissents, the Commission would reverse itself. Whatever its conclusions with respect to the *Duralite* decision, Alco elected to file its Section 1(4) damage claim with the Commission.

Alco did not, however, fully pursue that remedy. Immediately after an employee board (Review Board No. 4) issued its report concluding on the basis of *Duralite* that the Commission lacked jurisdiction to afford Alco any relief for a Section 1(4) violation, Alco amended its complaint in the District Court to raise its damage claim in that forum, while at the same time asking that the de-

cision of Review Board No. 4 be reconsidered. Thus, Alco elected not only to *initiate* its damage claim at the Commission, but it also attempted to *pursue* that claim both in the Commission and in the District Court. Section 9 was plainly intended to prevent such a duplicity of claims.

Having elected to proceed at the Commission, Alco should have followed through with that election. When Division 2 of the Commission denied its petition for reconsideration of the decision of Review Board No. 4, Alco could have (1) sought to have the matter considered by the full Commission by filing a petition for a finding that the case involved a matter of general transportation importance (49 C.F.R. § 1100.101(a)(4)), or (2) sought judicial review of that decision (28 U.S.C. § 2341). Alco did neither; instead, and even before the decision of Division 2, it switched forums, or adopted a new method of procedure, by amending its complaint in the District Court.

Thus, Alco's claim that its remedy at the Commission was nonexistent is without any basis whatever. As the District Court concluded, the ineffectiveness of Alco's remedy at the Commission was "due to its own inaction" (Petition, p. 29a) and it should not be permitted "to shuttle back and forth between the ICC and the courts" (*id.* at 31a).

Full pursuit of the remedy which Alco did adopt was entirely warranted in the circumstances: *First*, it was Alco's decision to proceed in that forum in the first instance; *Second*, the narrow decision in the *Duralite* case promised hope that the Commission might reverse itself; *Third*, the courts which have considered the question have indicated that the Commission does indeed have power to grant relief for violations of Section 1(4).[5]

---

[5] In *New York Central Railroad Company* v. *United States*, 201 F.Supp. 958 (S.D.N.Y. 1962), the court, noting both the duty im-

Alco contends now that the dismissal of its damage claim involves important federal questions which should be settled by this Court, that the decision of the Fourth Circuit affirming that dismissal is in conflict with decisions and principles established by other Courts of Appeals, and that the Fourth Circuit decision is in conflict with prior decisions of this Court. As shown hereafter, there is no merit to these contentions.

I.

THE FOURTH CIRCUIT DECISION DOES NOT RAISE QUESTIONS WHICH NEED BE SETTLED BY THIS COURT

In its Petition (pp. 7-11), Alco suggests that the Fourth Circuit has decided two important questions which should be settled by this Court. The first "question"—in reality, an assertion by Petitioner—is that if a shipper's damage claim is denied by the Commission for lack of jurisdiction and if the election provision of Section 9 then bars a similar remedy in court, the shipper "is destined to be caught in the toils of a procedural dilemma" (Petition, p. 7). The second question is whether the doctrine of *res judicata* should be applied to an administrative order determining a question of subject matter jurisdiction.

---

posed upon carriers by Section 1(4) and the Commission power under Section 13(2) to "make and enforce any order" (other than one for the payment of money), refused to set aside a Commission order annulling an embargo issued by the railroad. And in *Asbury* v. *Chesapeake and Ohio Railway Company*, 314 F.Supp. 310 (D.D.C. 1970), the court, whose "teachings" apparently prompted Alco to elect the Commission route (Petition, p. 8), stated only that the validity or reasonableness of embargoes, by which a railroad advises shippers that it is unable to perform its Section 1(4) duty, is "usually" left to a determination by the Commission (314 F.Supp. at 313).

A. Any "Procedural Dilemma" Was Entirely Of Petitioner's Own Making And Within Its Power To Resolve.

Petitioner's "procedural dilemma" rests on its assertion that *Asbury* v. *Chesapeake Co. Ry.*, 314 F.Supp. 310 (D.D.C. 1970) "taught" it that a shipper damaged by an embargo has no damage remedy in the District Court unless the embargo is first cancelled by the Commission (Petition, p. 8). Thus, Alco's argument proceeds, it purportedly followed the teaching of *Asbury* and filed its Section 1(4) damage claim with the Commission, only to have a panel of the Commission hold that it did not have jurisdiction under Section 1(4) to award it damages.

There was no "procedural dilemma." Alco misconstrued the *Asbury* decision; and it did not even follow what it now claims *Asbury* taught it.

Alco asserts that *Asbury* taught it that "a shipper damaged by an embargo has no damage claim in District Court unless the embargo is first cancelled by the Commission" (Petition, p. 8). But Alco didn't go to the Commission and ask that B&A's embargo be cancelled, thereafter to present its damage claim in court; instead, it made complaint with the Commission asking that B&A be ordered to cease and desist from violating Sections 1(4), 1(11) and 1(18) *and* seeking damages for such violations. Thus, even if Alco's reading of *Asbury* were correct, it did not proceed accordingly.

But Alco has not properly construed *Asbury* in any event. The *Asbury* court, in considering a shipper's Section 1(4) damage claim, stated only that the "validity or reasonableness of embargoes is *usually* left to a determination by the Commission" (314 F.Supp. at 313). Nonetheless, the court considered on the merits the challenge to the embargo, as well as the Section 1(4) damage claim — ". . . the plaintiff has not prevailed in court. The

embargo being lawfully invoked there are no damages to be recovered" (*id.*) Thus, *Asbury* created no "procedural dilemma"; it indicated only that an embargo could be challenged and a damage claim presented either to a court or before the Commission, but not both.

The fact that Alco was unsuccessful in securing an award of damages by the Commission was not because it was misled by *Asbury*, but rather because it chose not to test its own apparent conclusion that, notwithstanding the Commission's *Duralite* decision, that agency did have power to award its damages under Section 1(4) of the Act. As the District Court concluded: "For whatever reason, Alco decided not to pursue fully its initial choice. Alco therefore should not be allowed to begin again in another forum" (Petition, p. 29a). Accordingly, the fact that the parties did not " 'proceed to a determination before the Commission' on the merits," which in Alco's view (Petition, p. 9) is the only circumstance in which the election provisions of Section 9 can be applied, is due entirely to Alco's own tactical decisions.

B. *Res Judicata* Has No Application To The Circumstances Of This Case.

Alco next asserts (Petition, p. 9) that if the election provision of Section 9 is not applicable (the ultimate conclusion being presumed), the "decision below can be justified only if a final agency order determining a question of subject matter jurisdiction is *not res judicata* in a collateral proceeding" (Petition, p. 9). Alco's contention apparently is that once Division 2 of the Commission held that it did not have jurisdiction to award damages under Section 1(4), the matter is conclusive on anyone participating in that proceeding, including B&A, and upon the courts. Thus, in Alco's view, B&A may not contend in court, nor may the court itself consider, that Alco had made an election under Section 9.

Alco's contention wholly overlooks the fact that given two viable choices (and to this day we don't know if Alco's complaint to the Commission was or was not viable, since Alco chose not to test it), the election to proceed before the Commission ousts the District Court of jurisdiction. *Standard Oil Co.* v. *United States*, 283 U.S. 235, 240 (1931). Neither *res judicata* nor estoppel can operate to confer jurisdiction on the District Court. *Neirbo* v. *Bethlehem Shipbuilding Corporation*, 308 U.S. 165, 167-168 (1939).

Apparently recognizing that the application of the doctrine of *res judicata* to administrative proceedings has generally been limited to questions of fact (see, *e.g.*, *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966), Alco contends (Petition, p. 10) that the "time is now ripe" to apply *res judicata* to administrative determinations on questions of law (such as the agency's jurisdiction), suggesting that this Court's prior decisions in *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938), *Treinies* v. *Sunshine Mining Co.*, 308 U.S. 66 (1939), and *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940) provide a basis for doing so.

Nowhere does Petitioner explain the application of this trilogy of cases to the circumstances of this case. *Stoll* and *Treinies* do not even involve administrative proceedings, much less administrative proceedings initiated in the light of a statute requiring a choice of forums. *Stoll* held merely that a Bankruptcy Court order relieving a guarantor of his obligation (the court implicitly deciding that it had subject mater jurisdiction) was *res judicata* in a subsequent state court action to enforce the guarantee by a creditor who had notice of the bankruptcy pro-

ceedings. *Treinies* held that in a federal interpleader action involving inconsistent state court judgments (Idaho and Washington) the prevailing Washington court claimant who participated in the Idaho proceeding was bound by the determination of the Idaho court that the Washington court did not have jurisdiction of the subject matter.[6]

Adkins did involve an administrative agency; however, this Court held merely that the agency's determination (affirmed by the Court of Appeals, this Court denying certiorari) that plaintiff's coal was "bituminous coal" (subject to tax when sold by persons not members of the Coal Code) was *res judicata* in plaintiff's action in District Court to enjoin collection of the tax. The matter was not only *res judicata;* the Court held that the District Court did not even have jurisdiction to inquire into the nature of plaintiff's coal, since the administrative procedure was "exclusive" (310 U.S. at 404).

Thus, whatever may be said with respect to Petitioner's contention that this Court should extend the doctrine of *res judicata* to administrative determinations on questions of law, such as subject matter jurisdiction—a concept seemingly in conflict with the notion that questions of law are for courts to decide—plainly this is not the proper case for the Court to do so.

---

[6] If *Treinies* can be said to have any application to this case, it suggests that Alco should have pursued its initial choice of forums to the "fullest extent," as the District Court below said it should have, before contending that its remedy at the Commission was nonexistent. In *Treinies*, the Court said (308 U.S. at 77):

> "If decided erroneously in the Idaho proceedings, the right to review that error was in those (the Idaho) proceedings. While Petitioner sought review from the decree of the Supreme Court of Idaho by petition for certiorari to this Court, which was denied, no review was sought from the final decree of the Idaho District Court of August 18, 1936, on new findings of fact and conclusions of law on remittitur from the Supreme Court of Idaho."

II.

THE FOURTH CIRCUIT DECISION IS NOT IN CONFLICT WITH DECISIONS OR PRINCIPLES OF OTHER COURTS OF APPEALS

Alco contends that the Fourth Circuit's decision is in conflict with the Third Circuit's decision in *Seatrain Lines, Inc.* v. *Pennsylvania Ry.*, 207 F.2d 255 (3rd Cir. 1953) and with principles established by the Second, Seventh and Ninth Circuits.

Seatrain is distinguishable. There, the Third Circuit held that a water carrier's action in federal court against certain railroads under the antitrust laws, based upon the refusal of railroads not in a through route relationship with Seatrain to make their cars available to Seatrain, was not subject to dismissal on the basis of primary jurisdiction. The court noted that in prior proceedings before the Interstate Commerce Commission, that agency had concluded that it had jurisdiction to require railroads in through route relationship with Seatrain to permit the unrestricted use of their freight cars; the Commission also concluded, at the urging of the railroads, that it did not have jurisdiction to impose such a requirement on railroads not in through route relationship with Seatrain. In response to Seatrain's antitrust action, the railroads argued in court, contrary to their argument before the Commission, that the Commission *did* have jurisdiction to regulate car interchange even in the case of railroads not in through route relationship with water carriers and that the case should be dismissed on the basis of primary jurisdiction. The Third Circuit rejected that contention, holding that "the question of Commission power over car withholdings by railroads not in through route relationship with Seatrain is foreclosed by the rulings already made by the Commission itself" (207 F.2d at 259).

The principle of *res judicata* or estoppel reflected in *Seatrain* has no application to this case. In *Seatrain*, the court case was brought under the antitrust laws, while the prior Commission proceedings involved the car service provisions of Section 1 of the Interstate Commerce Act; here, Petitioner brought precisely the same action in court which it had previously initiated with the Commission. More fundamentally, however, Section 9 was not at issue in *Seatrain*, as no claim of damages had ever been filed with the Commission; and, while the court in *Seatrain* was concerned with the doctrine of primary jurisdiction, the question here was whether in the light of Section 9 the District Court had jurisdiction at all to entertain Petitioner's damage claim. Thus, the Fourth Circuit's decision in no way conflicts with *Seatrain Lines, Inc.* v. *Pennsylvania Ry.*

Similarly, the Fourth Circuit's decision is not in conflict with principles established by the Second Circuit in *Dennison* v. *Payne*, 293 F. 333 (2d Cir. 1923), the Seventh Circuit in *Landreth* v. *Wabash R. Co.*, 153 F.2d 98 (7th Cir. 1946), and the Ninth Circuit in *Pillsbury* v. *Alaska Packers Ass'n*, 85 F.2d 758 (9th Cir. 1936).

Dennison v. *Payne*, insofar as it might be said to pertain to this case, decided only that where plaintiff initiates a proceeding for wrongful death of an employee with the State Board, even if only for the purpose of tolling the running of the statute of limitations, the resulting finding of the State Board that the employee was engaged in intrastate commerce and its award of damages (from which no appeal was taken) precludes plaintiff from recovering in federal court under the Federal Employers Liability Act based upon an allegation that the deceased employee was engaged in interstate commerce. The Fourth Circuit's decision in this proceeding is not inconsistent with the principles followed in *Dennison*.

Pillsbury v. *Alaska Packers Ass'n* holds merely that in admiralty a ship owner is not entitled to challenge in District Court after some 20 months a Federal Compensation Board's jurisdictional finding of employment in view of that provision of the Long Shore Men's and Harbor Worker's Compensation Act which provides that an action in District Court to set aside a Board order must be brought within 30 days.

Landreth v. *Wabash* involved a situation in which an employer initiated proceedings before the State Compensation Board seeking an adjudication with respect to injuries to one of its employees. The State Board made an award to the injured employee, implicitly finding that he was injured in intrastate commerce. The injured employee's appeal to the County Court was dismissed. In a subsequent action by the employee in federal court under the Federal Employers Liability Act, the employer moved to strike on the ground that the State Board had already found that the employee was engaged in intrastate commerce and had fully adjudicated the matter. The Seventh Circuit affirmed the dismissal of plaintiff's complaint on that basis. The court observed that plaintiff's problem was the determination in the state court that he was engaged in intrastate commerce and that if that determination was in error it

> ". . . could have easily been corrected by an appeal to the Supreme Court of Illinois. This remedy plaintiff did not choose to pursue and it is too late to raise it here" (153 F.2d at 100).

The Fourth Circuit's decision here in no way conflicts with *Landreth* v. *Wabash;* indeed, it fully accords with that decision.

Thus, contrary to Petitioner's contentions, the decision of the Fourth Circuit is not in conflict with the principles announced in these three cases.

III.

THE FOURTH CIRCUIT DECISION IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT

In its Petition (pp. 12-13), Alco contends that the Fourth Circuit has decided two federal questions in conflict with prior decisions of this Court. Specifically, Alco contends that dismissal of its claim based on B&A's common law duty to provide transportation service conflicts with this Court's recent decision in *Nader* v. *Allegheny Airlines, Inc.*, 44 U.S.L.W. 4803 (U.S. June 7, 1976) and that the dismissal of its claim against Jubb, B&A's president and allegedly an aider and abettor, conflicts with *Terminal Warehouse* v. *Pennsylvania Ry.*, 297 U.S. 500 (1936).

A. Dismissal of Petitioner's Damage Claim Is Not In Conflict With *Nader* v. *Allegheny Airlines*

In *Nader* v. *Allegheny Airlines*, this Court held that Nader's common-law tort action based on alleged fraudulent misrepresentation (failure to disclose overbooking practice) need not be stayed pending a determination by the CAB as to whether overbooking was a "deceptive practice" within the meaning of Section 411 of Federal Aviation Act of 1958. This Court noted that the lower court was not called upon to substitute its own judgment for that of the agency (as in a case involving the reasonableness of a rate) and held that the common-law action and the statute "are not 'absolutely inconsistent' and may coexist, as contemplated by" the savings clause provision of the Federal Aviation Act.

The *Nader* decision is inapplicable to the circumstances of this case. There are significant distinctions: (1) The Federal Aviation Act, unlike the Interstate Commerce

Act, does not contain an election of remedies provision;[7] (2) the common-law action in *Nader* was not identical with the involved statute—"Section 411 is both broader and narrower than the remedies available at common law" (44 U.S.L.W. at 4807). In this case, Section 1(4) of the Interstate Commerce Act merely codified the pre-existing common law duty of a carrier to provide transportation; Section 1(4) neither adds to nor takes from this duty. *Pennsylvania R. Co.* v. *Sonman S. C. Co.*, 242 U.S. 120 (1916); *United States* v. *Pennsylvania R. Co.*, 242 U.S. 208, 226-227 (1916).

Since Petitioner's common law claim is identical to its Section 1(4) claim, it cannot circumvent Section 9 by pursuing its common law claim in District Court after it has elected to pursue the same claim under Section 1(4) at the Commission.

B. Dismissal Of Petitioner's Damage Claim Against Jubb Is In No Way In Conflict With *Terminal Warehouse* v. *Pennsylvania Ry.*

When it switched forums in its effort to secure damages, Petitioner joined B&A's President, Elmer J. Jubb, as a defendant. Petitioner now claims that dismissal of its damage claim is in conflict with this Court's decision in *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500 (1936).

Again, this Court's decision in *Terminal Warehouse* is inapplicable to the circumstances of this case. In that case, a warehouse company (Terminal) filed a complaint

---

[7] Indeed, it would seem that no election could have been made in *Nader* in any event, as the Court noted that "individual consumers are not even entitled to initiate proceedings under § 411" (44 U.S.L.W. at 4807).

with the Commission against Pennsylvania Railroad claiming damages in respect of allegedly discriminatory arrangements made between that railroad and another warehouse company (Merchants). The Commission found that the challenged arrangements were discriminatory, but refused to award damages as the evidence was too indefinite for that purpose. Thereafter, Terminal brought an action against Merchants and the Railroad, alleging violations of the antitrust laws and seeking treble damages. This Court ultimately held that as to both Merchants and the Railroad whatever liability was incurred arose from discriminations violative of the Interstate Commerce Act, and not from the antitrust laws; and that, because the complaint was framed solely on a conspiracy in restraint of trade theory, it should have been dismissed as to both defendants (297 U.S. at 516-517).

As pertinent to this case, the Court held that Section 9 of the Interstate Commerce Act operated to bar Terminal's court action against the Railroad under the Act, but that the "situation was altogether different, however, in respect of the liability of Merchants and other aiders and abettors" as to whom damages were not sought before the Commission, thus "relieving us of the duty to inquire whether jurisdiction would have existed if such relief had been demanded" (297 U.S. at 508).

Thus, the Court indicated that an election under Section 9 to proceed at the Commission against the Railroad did not bar a subsequent court action against an "aider and abettor," that is, a separate party to the discriminatory arrangements being challenged. In so indicating, the Court was influenced by the fact that under the Interstate Commerce Act any person who "shall aid or abet" any common carrier in any unjust discrimination, of the type involved in *Terminal Warehouse*, shall be jointly and severally liable with that common carrier in any court action brought by the person discriminated against (49 U.S.C. § 10(4)).

The dismissal of Petitioner's claim against Jubb, an agent of B&A and not a separate party, in no way conflicts with *Terminal Warehouse* which rests upon an express provision of the Act making aiders and abettors in discriminatory practices jointly and severally liable. What Petitioner complains of in this case is an alleged breach of duty to provide transportation service upon reasonable request therefor. Under Section 1(4) of the Act, as well as under the common law, the duty to provide transportation service rests with the "common carrier" (49 U.S.C. § 1(4)); *Johnson* v. *Chicago, M., St. P. & P. R.R.*, 400 F.2d 968 (9th Cir. 1968). Jubb is not a "carrier," as defined in the Act (49 U.S.C. § 1(3)(a)); consequently, he has no duty to provide transportation service. Indeed, Jubb has no right to engage in transportation as a common carrier, as he has no certificate of public convenience and necessity authorizing him to do so (49 U.S.C. § 1(18)). Plainly, Jubb cannot be liable in damages for any breach by B&A of its duty under Section 1(4) to provide transportation service.

Thus, the dismissal of Petitioner's damage claim against Respondent Jubb does not conflict with *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*

Conclusion

Petitioner has failed to demonstrate that there are special and important reasons warranting review by this Court; its Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LEE A. MONROE
1730 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Attorney for Respondents

Of Counsel:

SIDLEY & AUSTIN
1730 Pennsylvania Avenue, N.W.
Washington, D. C. 20006

Dated: August 18, 1976